CHAPTER 2

The EU and controlling the use of the death penalty: an organising principle for which fundamental norm?

Robert Kissack

This chapter discusses the EU's role in the global campaign to control the use of the death penalty over the last two decades. It draws on the theoretical insight of Wiener's *Theory of Contestation* to understand the evolving positions of states in favour of ending the use of the death penalty (abolitionists), which the European Union has actively supported, and those in favour of maintaining it (retentionists). The timeframe for the analysis is 2007 to 2018, spanning the period the use of the death penalty has been discussed and resolutions drafted in the United Nations General Assembly (UNGA) Third Committee (Social, Humanitarian and Cultural Issues) in the place of the UNGA Sixth Committee (Legal), where it had hitherto been discussed. The switch to the Third Committee is significant because it implies treating it as a human rights issue and as a consequence greatly enhances the scope of scrutiny into domestic practices of member state by the UN. Retentionist states that sought to protect their national sovereignty from (perceived) Western interference in their domestic legal systems through the vehicle of the UN, galvanised opposition to controlling the use of the death penalty by arguing that international law permitted its use provided certain internationally agreed standards of due process were respected. The chapter asks the following questions: which modes of contestation were used by the EU and against the EU in debates regarding controlling the use of the death penalty, and how successful were they? To answer these questions, a qualitative approach was taken analysing the discourse and argumentation of diplomats from primary sources in the form of the records of proceedings, official documents and reports of the UNGA of eight resolutions regarding a moratorium on the use of the death penalty (2007, 2008, 2010, 2012, 2014, 2016 and 2018). The contents of three High Level Panels debating the use of the death penalty in UN Human Rights Council (HRC) (2013, 2014 and 2017) were also used, and additional information from the Office of

the United Nations Commissioner for Human Rights (UNCHR). The chapter puts forward the claim that both supporters and opponents of the resolutions accepted that controlling the use of the death penalty is what Wiener refers to as an organising principle (or type-2 norm) for a higher-order normative objective. Contestation took place over which fundamental norm it belongs to, either the international human rights regime and the right to life, or the non-intervention in the domestic affairs of sovereign states. As will be shown, there are very credible reasons to associate it with both but that reconciling them with each other is difficult.

The chapter proceeds in three stages. The first part elaborates on the EU's promotion of the death penalty in the UN system and the location of the moratorium on the use of the death penalty at the nexus of two fundamental norms, drawing on UN archival records to substantiate its claims. The second part applies an analysis of contestation inspired by Wiener (2014) to the case and finding evidence of all four modes (arbitration, contention, justification and deliberation) across the UNGA Third Committee and the HRC. The third section discusses the outcome of contestation, advancing the argument that although abolitionists and retentionists draw on competing fundamental norms to defend their respective positions, over the period from 2007 to 2018 a process of change is observed, with the control of the use of the death penalty gaining acceptance as principally an organising principle of the fundamental human rights norm of the right to life. Evidence to support this claim is provided by detailed textual analysis of official documentation. The evidence points to hard contestation having taken place and a case can be made in favour of the EU strengthening the legitimacy of the norm. As is discussed in more detail, one issue that remains unresolved is how to explain the inclusion in 2016 and 2018 of amendments that support the retentionist position.

The European Union and the abolition of the death penalty

To what extent should the international community of states set conditions on when, how and for what crimes the death penalty may be used? Does the use of the death penalty violate the fundamental human right of the right to life? The normative positions on

controlling the application of capital punishment range from abolition to retention, with a spectrum of opinions in the middle including those wishing to restrict the use of the death penalty to a very few possible cases (for example treason) and those having effectively stopped executions but do not want to, or are not ready to, take the formal legal step of removing the death penalty from the statute. The intermediary positions are significant because the historical trend in many states is that parliaments take the decision to abolish the death penalty while a majority of citizens still support its use (McGann and Sandholtz, 2012, p.276). This chapter moves beyond moral arguments and frames the discussions as a contestation over the appropriateness of seeking to control the use of the death penalty among sovereign states. Specifically, it asks to what extent is controlling the use of the death penalty is an organising principle of the right to life, or for the non-intervention in the domestic affairs of sovereign states, both of which are fundamental norms of the international society of states. Three positions on this issue are identifiable. The first is the abolitionist assertion that international human rights law is growing in significance and should take precedent over a traditional, static interpretation of non-intervention. The second is the retentionist position that accepts human rights law, but says that such law should be created by consensus and there is currently no consensus on international control and in its absence the international community should not intervene in domestic practice. The third position recognises controlling the use of the death penalty as a legitimate organising principle for both norms and must weigh up when and where each one is relevant.

The right to life is stated in Article 3 of the Universal Declaration of Human Rights, which despite being a non-binding UNGA resolution is a foundational text of the international human rights regime. In a world where states are thought of as the most important actors, the 'idea of human rights puts individuals rather than states and their interests at the centre of organising global cooperation' and for this reason 'human rights norms and institutions [have] the potential of fundamentally transforming the international system' (Schmitz and Sikkink, 2002, p.526). Repeatedly, in both the HRC and the UNGA Third Committee, the argument is made that capital punishment is a violation of the most basic human right of all – the right to life. While there is no dispute from retention-seeking states that the right to life exists, they contest whether the use of the death penalty contravenes it. The counterargument is the death penalty is only applied in the very worst crimes, such as

murder, where the right to life of the victim of the crime has already been violated. Such a position is reinforced by the argument that a state is responsible for the safety of its citizens, and this is achieved through deterring violent crimes. Retentionist states also accept that there are limits to its use (such as for minors, pregnant women) as set out in the International Covenant on Civil and Political Rights (ICCPR) Article 6 and argue that provided safeguards are adhered to the death penalty is legal. Abolitionist states expound the view that the right to life is a universal norm that cannot be violated under any circumstances and that in the interim controls on its use should be transparently implemented and progressively tightened. Contestation about furthering the right to life hinges on the different views about the universality of the right within a national population (are perpetrators of heinous crimes excluded?), whether a hierarchy of rights-holders exists (should the violation of a victim's right to life be addressed first?) and to what extent there is consensus about limiting the application of the death penalty (regarding age, mental health, and the nature of the crime committed). Contestation about controlling the use of the death penalty in national law and practice is about the organising principle the fundamental right to life.

Article 2(7) of the United Nations Charter is frequently evoked to reject unwanted interference into the national affairs of sovereign states. It states that '[n]othing contained in the Present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. Non-intervention in domestic affairs is therefore a fundamental norm of the United Nations and is accordingly granted to its members. The connection between sovereignty and non-intervention can be traced back to the nineteenth century, when 'theorists of this period were able to recognise sovereignty as an attribute of all states, and the exchange of recognition of sovereignty as a basic rule of coexistence within the states system. They were also able to work out such corollary principles as the rule of non-intervention' (Bull, 1977/2002, p.35). Unlike in the HRC, where the human rights approach to considering the death penalty is obvious, in the UNGA the choice of which committee the death penalty is discussed is a point of contention. Prior to 2007, the use of the death penalty was treated as a legal issue and accordingly discussed in the Sixth Committee, where national practices were reviewed but there was unanimous acceptance that it was not prohibited in international law.

In 1994, the Italian government presented a resolution to the Third Committee of the UN General Assembly calling for the abolition of the death penalty. Although it attracted 49 co-sponsoring states, the resolution failed to gain a majority and some EU member states regarded it as too premature an effort (neither the UK nor Netherlands supported it).¹ In 1997, the Italian government succeeded in passing a resolution on the same issue in the UN Commission on Human Rights (UNCHR), in large part due to Western European and Other Group (WEOG), Eastern Europe and Latin American states occupying 26 of the 53 seats. In 1998, Italy steered another resolution through the Committee, in 1999 the Finnish Presidency presented one in the name of EU member states (Bantekas and Hodgkinson, 2000, p.23; Smith, 2006, p.160), and further resolutions were adopted in subsequent years. In 2005, at the 60th session of the UN General Assembly, the decision was taken to replace the UNCHR with the HRC. A number of reforms were made, related to the distribution of seats between regions (allocating more to Asian and African states), the selection of states to serve on the Council, and an upgrade in its status. Despite achieving higher levels of voting cohesion between EU member states in the HRC than in the UNCHR, the EU repeatedly found itself in the minority because of the rebalancing of region constituencies (Gowan and Brantner, 2008; Kissack, 2010; Smith, 2010; Macaj 2012). Faced with difficulties in the HRC, EU member states made a surprising strategic decision. Beginning in 2006, the EU started to galvanise consensus among states to table a resolution on the death penalty in the UNGA Third Committee. It was an unlikely place to seek support for the issue, but nevertheless Finland presented to the UNGA a statement with 87 co-signatories tabling the issue on the agenda. The following year, Portugal (holding the EU Presidency) was instrumental in the drafting of a resolution calling for a moratorium on the use of the death penalty that was passed by 104 votes to 57 with 29 abstentions in the UNGA Third Committee. The shift from abolition to a moratorium was a very significant concession that nearly broke EU unity, but in the intervening years the HRC in Geneva and the UN Secretary General have periodically reviewed the use of the death penalty

¹ The UK position was that although the death penalty was not handed down any longer, it did not regard itself as an abolitionist state because capital punishment remained on the statute for certain military offences. For the NL there was 'the belief that the draft resolution and general strategy would only serve to harden the position of retentionist countries' (Bantekas & Hodgkinson, 2000, p.28).

and noted a trend towards its removal from the legal statute of an increasing number of states in Africa, and a reduction of its use in states across Asia.

Today, the promotion of human rights figures prominently in EU foreign policy. The abolition of the death penalty is therefore a major objective of the EU and it claims to be 'the leading institutional actor in the fight against the death penalty worldwide' (EEAS 2013: 2). Nevertheless, seven of the ten most populous countries in the world retain capital punishment² and in the biennial UNGA votes on this issue, the number of states supporting a moratorium has plateaued at around 120, or two-thirds of the UN membership. What position do the 70+ states in this sizable minority take on the use of the death penalty, and how do they justify its use? While the EU was never the only actor advocating stricter control on the use of the death penalty, and it is important to note that the 2007 resolution was co-authored by nine other state (two from each UN region), opponents frequently lambasted the EU's role as an example of neo-colonialism. Yet as this chapter demonstrates, their resistance to controlling the application of capital punishment was not a rejection of human rights per se, but rather a rejection of the framing of the death penalty as exclusively a human rights issue. Instead, the repeated arguments of around 30 vocal opponents centre on the legality of the death penalty in international law, their abidance to internationally agreed norms controlling its application, and the principle of non-intervention in the domestic affairs of sovereign states. Given that the moratorium on the use of the death penalty is an organising principle that intersects two fundamental norms which are both 'notable for their wide moral and ethical reach' and have a 'quasi-constitutional quality in their global reach' (Wiener, 2017, p.117-119), this case is significant more widely as an example of what happens when equally credible claims clash.

In fact, something quite different has taken place. While positions in the UNGA remained entrenched, discussions about the capital punishment in the HRC began to increase the number of conditions placed on its use. Specifically, High Level Panel debates (in 2014,

² Only Brazil (5th), Russia (9th) and Mexico (10th) do not use capital punishment.

2015 and 2017) brought campaigners, NGO experts and UN staff (including the findings of Special Rapporteurs for Extrajudicial Killings and Torture and other forms of Inhumane Treatment) face to face with abolitionist and retentionist states. Often parliamentarians from states that had recently legislated against capital punishment also spoke, bringing micro-level actors (those responsible for implementing norms) in contact with government diplomats arguing about sovereignty and the right to life. Within the scope of this analysis of the UN system, these debates come closest to the ideal of normative contestation because they are open to widest range of actors involved in the issue of capital punishment. Within the accepted political space of the HRC, where the death penalty is exclusively treated as a human rights issue, contestation focuses on whether executions violate the right to life, may be considered inhumane, or amount to extrajudicial killing (when due process is ignored or legal protections are violated), as some abolitionists assert. Retentionist states' contestation must be located within the fundamental normative framework of the international human rights regime and not draw on counter claims centred on state sovereignty and non-intervention.

The visibility of the EU arguing in favour of increased control of the use of the death penalty through it being re-framed as a human rights issue has reduced over time from its initially high level. There is a strategic benefit to this, since the EU's proximity to the resolution fuelled resentment from African and Asian states keen to frame the issue as European neo-colonialism (Kissack, 2010; UN, 2007b, p.23). In the biennial revisions of the resolution starting in 2010, various Latin American states have led drafting efforts, although this did not stop retentionist states occasionally milking the rhetoric of imperialism. This was also during the period of Catherine Ashton as High Representative for the CFSP, who chose to make the promotion of human rights 'the silver thread running through European foreign policy' (EU, 2011). The abolition of the death penalty belonged in this foreign policy narrative, and in 2013 the European Council issued *EU Guidelines on the Death Penalty* to improve the effectiveness of collective European action through diplomatic channels, demarches, conditionality and funding initiatives to raise awareness in third countries (EEAS, 2013). For the EU during this time, the biennial votes in the UNGA was merely one of many policies in operation to promote this end, with emphasis too on bilateral communications through demarches and other channels to encourage abolitionist trends and to urge against retentionist backsliding. The arrival of the Juncker Commission in 2014, and the replacement of Catherine Ashton by

Federica Mogherini saw a reshaping of European foreign policy, articulated in the 2016 European Union Global Strategy (EU, 2016). EU's external action shifted to become focused on promoting the security of European citizens, through stabilising the Eastern and Southern borders, tackling terrorism, addressing transnational migratory movements and increasing the resilience of European societies (Wagner and Anholt, 2016). While the EU is still using the 2013 guidelines to reduce the use of the death penalty globally, DG International Cooperation and Development has taken the responsibility for them (EU n.d.). The EEAS still takes a strong abolitionist position on the annual World Day Against The Death Penalty (10 October) and works with the Council of Europe to enforce the Second Protocol of the European Declaration on Human Rights that prohibits the use of the death penalty in Europe as a whole.³

The EU's promotional diplomacy is not the only thing to have changed since the first UNGA resolution in 2007. States that were once ardent supporters of abolition and members of the original ten co-authoring states, such as the Philippines and Brazil, have elected Presidents intent on re-introducing capital punishment and speak of its virtues. These are but two examples of a global trend in the rise of populist and nationalist movements that typically articulate tougher sentencing and threaten to undermine national executive support for established foreign policy positions built using considerable amounts of diplomatic capital.⁴ Nevertheless, the 60-70 states that do not vote in favour of the UNGA resolutions can be divided into four groups. Firstly, there is a sizable minority of states that abstain rather than vote for or against the resolution. The usual reasons explaining abstentions hold in this case as others: no clear national position, insufficient information from the national capital for the ambassador to vote, or a conflict of interests between national and international constituencies. There are also reasons that are specific to the death penalty, such as ongoing

³ Ian Manners' 2002 article on Normative Power Europe made the claim that the EU has taken the initiative from the Council of Europe on the abolition of the death penalty through internationalising the issue when issuing demarches in support of death-row detainees in the US. There was a longer history behind this, with Germany taking the US to the ICJ in March 1999 to appeal against the execution of a German national in the state of Arizona, on the basis of a violation of the 1963 Vienna Convention on Consular Relations. See Quigley, 2018, p.108-110.

⁴ In 2016, the Philippines abstained in the UNGA vote on moratorium on the use of the death penalty resolution after previously voting in favour and defending the resolution among the most hostile regional group – Asia.

domestic reviews into the use of the death penalty or a genuine conflict between the international human rights regime and the norm of non-intervention into the domestic affairs of sovereign states. Secondly, there is a small group of OECD states that have not yet committed to abolish the death penalty – the United States, Japan and South Korea (although the latter is a *de facto* abolitionist according to Amnesty International as it has not executed a prisoner since 1997). These states generally keep a low profile among the retentionist group, first and foremost for wanting to avoid being associating with the majority of them.⁵ Thirdly, there are the staunchly retentionist states that continue to use the death penalty, including China, Egypt, India, Iran, Iraq, Malaysia, North Korea, Pakistan, Singapore, Syria, Saudi Arabia, Sudan, Zimbabwe and Yemen, as well as all of the Caribbean states except Haiti. In total, there are around 30 countries which repeatedly protest that the UN has no authority to control the use of the death penalty by its members. The retentionist group is not homogeneous, however, and the remaining states constitute the fourth group that do not execute but as a matter of principle reject control because it is seen as a violation of national sovereignty (such as Botswana, Papua New Guinea and Venezuela). These states hold a particularly strong position in debates – they cannot be accused of defending the use of the death penalty out of national self-interest, and often use the rhetorical device of reminding Europeans that the last execution in their territory was during the colonial era, or that the death penalty remains in national law because it existed at the time of independence (Barbados noting that the ‘inclusion of the death penalty in its penal code has been inherited from one of the main co-sponsors of the draft’ (UN, 2008b, p.16)). In summary, the majority of states opposed to controlling the use of the death penalty are in Asia and the Caribbean, as well as a number from Africa and the very few OECD members previously mentioned. As such, within the UN, the WEOG group, the Eastern Europe Group, and Central and South American states from the Latin American and Caribbean Group (GRULAC) are near unanimous in treating the death penalty as a right to life issue, while members of the Africa and Asia regions are divided.

⁵ In 2008, 58 retentionist states co-signed a letter to the UN Secretary General ‘to place on record that they are in persistent objection to any attempt to impose a moratorium on the use of the death penalty’, Japan was among the list of states (UN 2008d). Although subsequent letters have been written in 2009, 2011, 2013, 2015 and 2017, Japan has never been included again.

A Decade-Long Transition from Arbitration to Justification

Different actors involved in the contestation of norms have different opportunities to make their positions known. While Wiener is concerned with discrepancies between stakeholders at local levels and elites at the international level, this research focuses primarily on diplomatic encounters at the UN and the modes of contestation they employ. This section is based on detailed textual analysis of UN documents in the UNGA and HRC, pertinent to controlling the use of the death penalty. The overall finding is that a slowly increasing majority of states accept controlling the use of the death penalty as an organising principle of the international human rights regime, while a minority of states situate it as an organising principle of the norm of non-intervention in the domestic affairs of sovereign states. Thus, abolitionists and retentionists are not at opposing ends of a uni-directional, linear progression towards human rights promotion, first generation norm diffusion literature such as Finnemore and Sikkink (1998) proposed. Instead, here we find both sides drawing on alternative fundamental norms to ground their contestation. This raises an important question for the theory of contestation: can an organising principle have a constitutive role operationalising two different fundamental norms?

The diplomats' interventions studied here represent only one actor among the many involved in contesting capital punishment, which also include national judiciaries, police forces, parliamentarians, civil society groups and citizens involved in crime as perpetrators or victims. Some representatives of these voices were heard in the HRC High-Level Panels but given the normative bias toward locating the control of the death penalty in the international human rights regime, the voices spoke from the perspective of the sanctity of the right to life. In the UNGA and HRC, the majority of actors involved are national diplomats and legal experts representing member states in the UN system. The modes of contestation used are specific to the social institutions in which they meet and the practices they engage in that constitute the act of diplomacy in the UN. As the editors set out in the introduction (Johansson-Nogués, Vlaskamp and Barbé, present volume), there are four possible modes of contestation: arbitration, deliberation, contention and justification, and all four are used in death penalty

debates in the HRC and UNGA. As will be shown, different modes were employed at different times, varying according to forum, and across time. While arbitration and deliberation were initially found, contention and justification were employed later.

Arbitration as legal contestation was the initial response by retentionist states against efforts to control the use of the death penalty. Diplomats protested against including the death penalty on the agenda of the UNGA Third Committee in the place of the Sixth Committee, citing two powerful legal arguments. Firstly, the use of the death penalty cannot violate human rights because it is permitted in international law in the UDHR and the ICCPR. Secondly, the use of the death penalty is not a human rights issue, but a criminal justice issue. While both these arguments reinforce the situation *ex anti* that the death penalty was not a human rights issue, the two arguments are inconsistent with each other because second is an outright rejection of the link between the death penalty and human rights, while the first acknowledges the connection but says that it is not important. Examples of the first argument are numerous. In 2007, Singapore stated ‘that penalty could not be a violation of human rights, as it was not forbidden under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights’ (UN, 2007a, p.10), and it repeated the argument a year later in the plenary at the time of the final vote to reminded delegates again that Article 6 of the ICCPR permitted its use under certain circumstances. The rules that permit capital punishment were defended again in 2010 by Jamaica, which ‘refuted the implication that the death penalty was, per se, contrary to international law’ (UN, 2010, p.14), as part of the general point that the Third Committee should not be discussing this issue because no violation occurs. Turning to the second argument, in 2007, the representative of Sudan said he ‘could never have imagined that the [Third] Committee would consider a draft resolution which was counter to the Charter and not directly related to human rights’ (UN, 2007a, p.17). Libya said that there ‘was no link between that [death] penalty and human rights’ (UN, 2007a, p.18). The same arguments are repeated in 2008, with the Iranian delegate stating the ‘abolition of the death penalty was not a matter of human rights’ (UN, 2008b, p.13), among many voices expressing similar positions. Botswana, for example, was clear ‘the death penalty was a criminal justice matter’ (UN, 2008b, p.20). This line of argument remains popular with retentionist states, for example in 2012 the Sudanese representative stated ‘those that have co-sponsored the text have not succeeded in making it a human rights issue’

(UN, 2012a, p.6) and in 2014 the Botswanan representative states 'the draft resolution makes an unjustified linkage between the death penalty and human rights. The death penalty was a criminal justice issue, not a matter of human rights' (UN 2014a: 10).

In parallel to arbitration, retentionist states also employed the mode of deliberation by contesting the political nature of the abolitionist effort. Their argument was that placing the death penalty on the agenda of the Third Committee when there was no consensus as to its rightful place there constituted the politicization of the issue. This refers to forcing a minority of states to defend their national positions publicly under the supposition that they are 'deviant' with the majority's 'correct' position, and is regarded as using the UN to promote a particular interest, rather than the common interest. The singling out of the EU as the leader of the initiative, although inaccurate because ten states co-authored the original resolution, was a powerful rhetorical tool as it both framed the debate within the neo-colonialism discourse and implied that states from the Global South supporting the resolution were not properly independent.

In declaring victory, the sponsors of the draft resolution have claimed proof that the values of the European Union (EU) are increasingly universal values. [...] The reality is that for many delegations this is a criminal justice issue and not a purely human rights issue, as the European Union and its allies assert. (UN, 2007c, p.15)

These arguments contending that the Third Committee was the wrong venue to hold a discussion about the death penalty were the bulwark of retentionist opposition in the 2007 and 2008. In the subsequent years they still retained some utility, they were used alongside other modes of contestation.

Contention occurs when the societal grounds for the norm are contested. In this case, claims that different societies have legitimate reasons to retain the use of the death penalty are called upon to permit retention. Building on the arbitration mode emphasising legality, societal contention stresses a plurality of legitimate reasons for executions. We observe more contention from retentionists than abolitionists, an example of which was presented by

Singapore in 2007 when it claimed that ‘all rules were not suitable for application in all places in all times’ (UN, 2007a, p.18). Remarkably similar was a statement by Egypt five years later, contending that ‘all rules were not suitable for application in all societies at all times’, (UN, 2012a, p.11). This position strongly supports sovereigntist arguments, and that ‘states could develop their own legal statutes only in accordance with international law’ (UN, 2014,; pp.8-9). Thus, while contention draws on legal arguments, the strategy of retentionists was to emphasise their national systems were socially appropriate. In 2008, Egypt’s intervention in the UNGA plenary reminded delegates that

in Islamic jurisprudence the death penalty is restricted to the most serious crimes. It may be imposed only within the application of the due process of law in order to ensure that the punishment is compatible with the legal and religious regulations and that no one is arbitrarily deprived of the right to life. (UN, 2008c, p.27).

Societal cohesion and the protection of community is the second example of contention. Singapore, as one of the retentionist vanguards, proposed that ‘the state had the responsibility to protect its citizens’ (UN, 2014a, p.9) and Nigeria introduced this theme when it addressed the General Assembly plenary in 2007, saying that the ‘death penalty is retained on our statute books in order to serve the purpose of our internal security and as a deterrent to criminals who would not balk at threatening and taking the lives of innocent people, including civilians’ (UN, 2007b, p.16). Iran echoed this point, justifying capital punishment on its legal statute as crime prevention and the ‘best punitive measure to ensure the safety, security and well-being of their citizens’ (UN, 2016a, p.7).

The fourth mode of contestation is the making of moral arguments: justification. This mode is most apparent in recent years, during which a common moral standard has crystalized within debates, accepting that the right to life and freedom from inhumane treatment cannot be outrightly rejected, even by appealing to a different fundamental norm. The previous modes of contestation have edged closer to justification – moving from outright rejection of common ground towards a shared normative reference. Undoubtedly, this common reference developed through the High Level Panel discussions in the HRC, where

arguments about non-intervention and infringements on state sovereignty carry far less weight. Indeed, during the years of the Obama Presidency, the US abstained from voting on capital punishment issues in the HRC while voting against them in the UNGA. While we cannot extrapolate from America to all retentionist states, it is nevertheless indicative of a differentiated approach between the two institutions. Specifically, the content of three HRC High Level Panels debating the use of the death penalty in 2013, 2014 and 2017 were analysed alongside references to the UNGA debates. These panels were organised by the UNCHR and included guests from regional organisations, national governments and civil society organisations, as well as UN Special Rapporteurs on extrajudicial killing and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment. The panels were explicitly abolitionist and normatively grounded in the assertion that capital punishment violated the right to life. Retentionists were, therefore, on the defensive and evidence of justification should be acknowledged as being in a non-neutral setting.

The UN High Commissioner for Human Rights submits annual reports to the HRC on developments regarding the use of the death penalty on a yearly basis. Contained within them are detailed records on changes in law and practice at a national and regional level that have taken place in the preceding year with regard to capital punishment (UN, 2016d, p.3-5; UN, 2014b, pp.3-5; UN, 2013, pp.3-4; UN, 2012b, pp.3-5 *inter alia*). The objective is to demonstrate the breadth of states from different regions that come to the same conclusions in their national judicial systems. To this end, the contention identified above in which national diversity was defended, was challenged by empirical evidence to support the universalist position. Global consensus from the bottom-up is both more credible when arguing that there is a movement towards a common understanding, as well as rejecting the claim that a progressive human rights agenda is European in origin and inherently colonialist.

Epistemic communities have long been noted for their ability to provide knowledge to international negotiators that is regarded as unbiased by national interests (Haas, 1993) and in this case served to justify abolitionist arguments. In the 2013 HRC report on the use of the death penalty, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded that “states cannot guarantee that there is a no pain-free manner of execution’ (UN, 2013, p.14). The Rapporteur addressed the 2017 High Level

Panel to remind participants that it is 'almost impossible to carry out the death penalty without violating the prohibition of torture and other cruel, inhuman and degrading treatments or punishments' (UN, 2017, p.6). The Special Rapporteur for extrajudicial, summary or arbitrary executions noted in her report to the UNGA in 2016 that 'international law can no longer be seen as retentionist' (UN, 2016c, §39), and the HRC High Level Panel concluded that while 'international law did not explicitly equate the death penalty with torture, it did view it as incompatible with the right to life' (UN, 2017, p.3). What evidence is there that the contestation process has yielded results? Returning to the UNGA, in the plenary debate of the 2016 Moratorium resolution, the representative of Papua New Guinea, a staunch retentionist, stated 'my delegation recognises that *the core issue addressed in this resolution is the right to life*. However, other highly important elements including issues of sovereignty and national criminal justice systems, *are also associated* and require careful and proper consideration'. (UN, 2016b, p.30; emphasis added). The distinction between a 'core issue' and 'associated issues' represents a major concession from retentionists, compared to their arguments a decade earlier.

The contestation seen in the first years of this case is clearly an example of hard contestation. The objective of retentionists was to prevent the death penalty from becoming associated with human rights and to retain the control of the use of the death penalty as an organising principle of the norm of non-intervention. In the latter years the position of retentionists was moderated by the concession to accept that there was a human rights dimension (as evidenced by the statement made by Papua New Guinea in 2016). It would therefore appear that the EU (and the numerous states taking the same position) had overcome the challenge and prevailed. However, we must also consider the successful inclusion of an amendment championed by retentionists to include a reference to the importance of state sovereignty in the text. This strategy was unsuccessful between 2007 and 2014, but in 2016 the first paragraph of the resolution was amended, saying it 'Reaffirms the sovereign right of all countries to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations' (UN, 2016e). The vote to accept the amendment in the Third Committee was close (76 in favour to 72 against with 26 abstentions), but its passing could be considered as a victory for the retentionist goal of reflecting within the resolution text the alternative fundamental norm of

non-intervention in state sovereignty. The same amendment was passed in 2018 (UN, 2018), suggesting that it was not an isolated or chance occurrence. It is therefore credible to argue that hard contestation was successful in recent years, and that the EU's norm preference has been damaged. How can the two findings be reconciled? One convincing answer is to turn back to Wiener, and the observation that retentionists and abolitionists have shifted their positions with regard to accepting the normative claims made by each other. Instead of rejecting each one outright, retentionists accept the human rights dimension is legitimate, while abolitionists have chosen not to live with the amended resolution. The control of the use of the death penalty has been accepted as an organising principle of both fundamental norms.

Hard contestation and increased legitimacy

The central issue to consider when assessing the outcome of the contestation process is whether the legitimacy of the norm promoted by the EU has been strengthened or weakened, and by extension, what impact that has had for EU foreign policy legitimacy. Given the size of the collation of states seeking to make control of the use of the death penalty an organising principle of the fundamental norm of the right to life, we purposefully refrain from labelling it the *EU's* norm. It should also be remembered that the common theoretical framework of this book is intended to look at the impact of the contestation process on the EU and its foreign policy, and that this is a departure from the ambition of Wiener which is to look at the legitimacy of a norm at the global level as the contestation process proceeds. In this volume it would be argued that the rebuttal of a hard contestation challenge by actors unhappy with a norm promoted by EU foreign policy that is rebuffed would increase the legitimacy of the EU and its norm. For Wiener, the process of contestation is sufficient to increase the legitimacy of the norm, regardless of the winners and losers after the outcome. This section will discuss the outcome from both perspectives because the critical defining aspect of this case is that the organising principle (type-2 norm) could legitimately be connected to the two fundamental norms discussed.

The empirical investigation identified all four modes of contestation in operation, with arbitration (legality) and deliberation (politicisation) during the initial years after the 2007 UNGA resolution. Contention (societal relevance) was used less in the early years but remained an important mode through the period of the study, while justification (morality of the death penalty) became more prominent towards the end and drew on arguments at the HRC. In terms of hard or soft contestation, it must be considered 'hard' because throughout retentionists' were asserting the claim that an alternative fundamental norm was being too readily ignored that had equal significance (non-intervention in the domestic affairs of sovereign states), and that it should displace the EU's foreign policy position that the death penalty was a HR issue. To assess the legitimacy of the norm in the face of hard contestation, we must consider whether the norm remains robust or was damaged by contestation - from the perspective of the EU's foreign policy goals. Unfortunately, the answer is inconclusive. On the one hand, the resolutions accrued growing numbers of votes in the UNGA, and as retentionist states conceded control was a human rights issue we could consider this enhancing the robustness of the norm. On the other hand, the substance of the resolution was weakened by the inclusion of a reference to sovereignty and thus suggestive of damaging it. One way forward towards greater clarity is to examine how the EU has adapted its policy position on the death penalty over the period of the study.

Although the EU remains strongly committed to controlling the use of the death penalty globally, it has become less prominent as a signature for EU foreign policy, becoming instead an essential component of international cooperation and as such part of the wider human rights dialogue between the EU and third states. While on the one hand this may appear to be a demotion of the death penalty to simply another part of the general human rights commitments the EU expects of states, on the other hand the normalisation of the death penalty within human rights dialogues reflects the trend identified in the UN system. While the outcome shows consistency between the EU and the UN, the appointment of a new High Representative for the CFSP in 2014 and the accompanying shift in focus from global human rights promotion to the prioritisation of threats to European security and internal cohesion is the primary cause of the reduced prominence. What is certain is that the international normative environment did not constrain the refocused policy. Reducing the conspicuousness of advocating death penalty abolition in EU foreign policy gave attention to

other states and regional organisations that also work toward the same goal and allowed them more visibility. As noted, in the initial years of UNGA resolutions the retentionists labelled them 'EU' as a way to discredit the action in the eyes of African and Asian states. In summary, the EU has normalised the control of the death penalty in its foreign policy by integrating it into human rights dialogue alongside other issues. This is consistent with internationally observed normative trend of broader acceptance of controlling the death penalty being an organising principle of the right to life. It is not possible to say that the changing approach was a direct response to the evolving position in the UN, as highly plausible internal reasons for the change are also identifiable.

Wiener's prioritisation of the process of contestation over the relative positions and aggregated outcome of the positions of the contesting parties would interpret the findings differently. The retentionist states that succeeded in placing their amendment in the resolution saw this as important, but nevertheless voted against the resolution overall. Conversely, abolitionist states - including Slovakia speaking for EU member states and 29 other states intervening individually or on behalf of others - 'disassociated' themselves from the amended paragraph (UN, 2016a, pp.5-6) and yet accepted begrudgingly its inclusion, and voted in favour of the resolution as in previous years. As recognised by Singapore in the UNGA plenary debate: 'In particular, I appreciate the decision of the sponsors to not reopen the amendment contained in paragraph 1 of the resolution. I know that this was not an easy decision for the sponsors, and I thank them for adopting an open- minded approach' (UN, 2016b p. 33). In the resolution text from 2016 and 2018 we see a text that overwhelmingly locates control of the death penalty with the fundamental norm of the right to life, while including too an acknowledgement that the fundamental norm of non-intervention cannot be ignored. As such, the resolution recognised that it is the organising principle of two fundamental norms, not one. The legitimacy of the norm is increased because the dispute over the type-2 norm has been resolved. By looking at the process as well as the aggregated outcome rather than just from the EU's perspective, a firmer conclusion in terms of increased legitimacy is reached.

Conclusion

The European Union is deeply involved in the process of controlling the application of capital punishment in third states on the grounds that executions contravene the right to life and right to freedom from torture and other cruel, inhuman or degrading treatment. For the EU, controlling the use of the death penalty is an organising principle of the fundamental norm of the right to life, the most essential human right. Many other states in the UN system are in agreement. However, the issue of control is also applicable to the fundamental norm of non-intervention in the domestic affairs of sovereign states, albeit inverted to prevent control being exercised. Determining which fundamental norm has primacy can only be done through contesting the issue within the institutional setting of the UN system, and specifically the UNGA and the HRC. By using the framework of the book, a number of important factors explaining the process of change over time were identified. Firstly, the four modes of contestation mapped the different strategies used by retentionists and abolitionists alike, as well as giving insight into why some were preferred to others at certain times. At all times, contestation was hard because retentionist states sought to reconfirm the primacy of a legalist view of the death penalty instead of a human rights one. Secondly, it extricated the different behaviour of states in the UNGA and the HRC, bringing to the fore that in the latter the norm of non-intervention carries far less authority than the former. Over time, the control of the use of the death penalty has been more firmly established as an organising norm of the international human rights regime and in particular the right to life, than one of the non-intervention in sovereign states, although in the 2016 and 2018 resolutions a new dynamic has been noted in which recognition of state sovereignty has been (controversially) incorporated. The EU contributed significantly to this outcome over the period of the study, but the work of other actors should neither be overlooked nor undervalued.

The extent to which the legitimacy of the abolitionist norm has been strengthened over the last decade of contestation is a matter for debate. Using the common framework that places emphasis on the EU as the recipient of the contestation challenge yielded mixed conclusions. The incremental growth in support for the resolution and the concessions made by leading retentionist states that the human rights dimension is the most important surely point toward a robust norm in the face of hard contestation and a consolidation of its legitimacy. Yet the concessions made in 2016 and again in 2018 show that a narrow majority

of states are in favour of recognising the importance of state sovereignty and by extension the belief that human rights are not universal, but specific to each country. Retentionists regard this as a victory, a weakening of the normative basis and damaging its legitimacy. The conclusion is unsurprising because of the fact that in this case, controlling the use of the death penalty implicates two fundamental norms that are in themselves difficult to reconcile. Returning to the work of Wiener that inspired the project, a clearer answer was revealed, noting that the resolution text of the last two sessions has found a compromise that allows one organising principle to belong to two fundamental norms, and that as a type-2 norm it increases its legitimacy through the process of contestation.

References:

Bantekas, I. & Hodgkinson, P. (2000). Capital Punishment at the United Nations: Recent Developments. *Criminal Law Forum*, 11(1), 23-34.

Bull, H. (1977/2002). *The Anarchical Society*. Basingstoke: Palgrave.

EEAS. (2013). *Background: The Death Penalty and the EU's policy on its abolition*. Luxembourg: Office for Official Publications of the European Communities.

European Union. (2003). *European Security Strategy*. Luxembourg: Office for Official Publications of the European Communities.

European Union. (2011). *Human Rights and Democracy at the Heart of EU External Action: Towards a More Effective Approach*. Luxembourg: Office for Official Publications of the European Communities.

European Union. (2016). *European Union Global Strategy*. Luxembourg: Office for Official Publications of the European Communities.

European Union. (n.d.) Retrieved 12 June 2019 from https://ec.europa.eu/europeaid/sectors/human-rights-and-governance/democracy-and-human-rights/fight-against-death-penalty_en.

Finnemore, M. & Sikkink, K. (1998). International Norm Dynamics and Political Change. *International Organization*, 52(4), 887-917.

Gowan, R. & Brantner, F. (2008). *A Global Force for Human Rights? An Audit of European Power at the UN*. Brussels: European Council on Foreign Relations.

Haas, P. (1993). Epistemic Communities and International Policy Coordination. *International Organization*, 46(1), 1-35.

Kissack, R. (2010). *Pursuing Effective Multilateralism: The European Union, International Organisations and the Politics of Decision Making*. Basingstoke: Palgrave.

Kissack, R. (2012). The EU in the negotiations of the United Nations General Assembly Resolution on a Moratorium on the use of the Death Penalty. In J. Wouters, H. Bruyninckx, S. Basu, S. Schunz (Eds.), *The European Union and Multilevel Governance: Assessing EU Participation in the United Nations Human Rights and Environmental Fora* (pp. 103-121). Basingstoke: Palgrave.

Macaj, G. (2012). Squaring the circle? EU outreach and bloc politics in the Human rights Council. *Paper presented at LISBOAN – ERASMUS ACADEMIC NETWORK: EU external*

representation and the reform of international contexts: practices after Lisbon. The Hague, NL: Clingendael.

Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*, 40(2), 235-258.

McGann, A. & Sandholtz, W. (2012). Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors. *International Studies Quarterly*, 56(2), 275-289.

Quigley, J. (2018). *Foreigners on America's Death Rows*. Cambridge: Cambridge University Press.

Schmitz, H.P. & K. Sikkink. (2002). International Human Rights. In W. Carlsnaes, T. Risse & B.A. Simmons (Eds.), *Handbook of International Relations* (pp. 517-37). Thousand Oaks, CA: SAGE.

Smith, K.E. (2006). Speaking with One Voice? European Union Coordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), 113-137.

Smith, K.E. (2010). The European Union at the Human Rights Council: Speaking with one voice but having little influence. *Journal of European Public Policy*, 17(2), 224-41.

UN. (2007a). Press Release GA/SHC/3905, 14 November 2007. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2007/gashc3905.doc.htm>

UN. (2007b). Press Release GA/SHC/3906, 15 November 2007. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2007/gashc3906.doc.htm>

UN. (2007c). A/62/PV.76. Retrieved 12 June 2019 from: <https://undocs.org/en/A/62/PV.76>

UN. (2008a). Press Release GA/SHC/3938, 18 November 2008. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2008/gashc3938.doc.htm>

UN. (2008b). Press Release GA/SHC/3939, 20 November 2008. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2008/gashc3939.doc.htm>

UN. (2008c). A/63/PV.70. Retrieved 12 June 2019 from: <https://undocs.org/en/A/63/PV.70>

UN. (2008d.) A/62/658. Retrieved 12 June 2019 from: <https://undocs.org/en/A/RES/62/658>

UN. (2010). Press Release GA/SHC/3996, 11 November 2010. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2010/gashc3996.doc.htm>

UN. (2012a). Press Release GA/SHC/4058, 19 November 2012. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2012/gashc4058.doc.htm>

UN. (2012b). A/HRC/21/29. Retrieved 12 June 2019 from: <https://undocs.org/en/A/HRC/21/29>

UN. (2013). A/HRC/24/18. Retrieved 12 June 2019 from: <https://undocs.org/en/A/HRC/24/18>

UN. (2014a). Press Release GA/SHC/4124, 21 November 2014. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2014/gashc4124.doc.htm>

UN. (2014b). A/HRC/27/23. Retrieved 12 June 2019 from: <https://undocs.org/en/A/HRC/27/23>

UN. (2016a). Press Release GA/SHC/4189, 17, November 2016. Retrieved 12 June 2019 from: <https://www.un.org/press/en/2016/gashc4189.doc.htm>

UN. (2016b). A/71/PV65. Retrieved 12 June 2019 from: <https://undocs.org/en/A/71/PV.65>

UN. (2016c). A/71/372. Retrieved 12 June 2019 from: <https://undocs.org/en/A/RES/71/372>

UN. (2016d). A/HRC/33/20. Retrieved 12 June 2019 from: <https://undocs.org/en/A/HRC/33/20>

UN. (2016e). A/RES/71/187. Retrieved 12 June 2019 from: <https://undocs.org/en/A/RES/71/187>

UN. (2017). A/HRC/36/27. Retrieved 12 June 2019 from: <https://undocs.org/en/A/HRC/36/27>

UN. (2018). A/RES/73/175. Retrieved 12 June 2019 from: <https://undocs.org/en/A/RES/73/175>

Wagner, W. and R. Anholt. (2016). Resilience as the EU Global Strategy's new leifmotif: Pragmatic, problematic or promising? *Contemporary Security Policy*, 37(3), 414-430.

Wiener, A. (2014). 'A Theory of Contestation'. Springer Briefs in Political Science.

Wiener, A. (2017). *A Theory of Contestation: A Concise Summary of Its Arguments and Concepts*. *Polity*, 49(1), 109-125.