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Article

Does the EU Benefit From Increased Complexity? Capital Punishment in the Human Rights Regime

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Abstract
This article questions how the EU has acted to increase the complexity of the human rights regime through the process of incorporating a new issue area into its scope and to what extent has it benefitted from that process. By examining the breadth of the regime complex, between 1991–2021, this research shows how UN bodies, regional organisations, and civil society associations increasingly consider the death penalty a human rights issue instead of an exclusively domestic legal one. The article draws on a comprehensive archival review tracing the process of reframing capital punishment, the actions undertaken by the EU contributing to this process, and the benefits it receives from increased regime complexity. This leads to an affirmative answer to the previous questions, arguing that the EU's actions in its foreign policy, anti-death penalty stance, and promotion of civil society, facilitated a reconfiguration of the human rights regime complex towards the rejection of capital punishment. It also provides important insights into the limitations of the literature on EU actorness in the UN system, which trains its eye primarily on legal representation and member-state cooperation. While this applies to formal international organisations, characterising the post-1945 multilateral order, utilising the study of regime complexity provides a more precise assessment of EU action in the fragmented and increasingly informal institutions constituting global governance today.

Keywords
death penalty; EU; foreign policy; human rights; regime complexity; UN

Issue
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1. Does the EU Win or Lose When Complexity Increases?

The study of regime complexity (Alter & Meunier, 2009; Eilstrup-Sangiovanni & Westerwinter, 2021; Raustiala & Victor, 2004) is part of an emerging literature explaining changes to the architecture of global governance, alongside transnational networks (Slaughter, 2004), "transnational new governance" (Abbott & Snidal, 2010), the rise of informality (Roger, 2019; Vabulas & Snidal, 2013), and hierarchy and power (Barnett et al., 2021). In regimes based on formal intergovernmental organisations, such as the UN, that characterise "old international governance" (Abbott & Snidal, 2010, p. 315), the EU experiences barriers to participation including (a) formal membership rules permitting only sovereign states, (b) reluctance of some EU member-states to concede international standing and voice, and (c) other IO members scepticism about EU membership (Kissack, 2010; Laatikainen, 2010; Laatikainen & Smith, 2006; Wouters et al., 2007). Therefore, creating institutions with different membership rules will potentially benefit the EU. When complexity intensifies because the number of informal intergovernmental organisations grows, the EU stands to gain if membership rules are changed. Conversely, if informality entails the absence of secretariats that prevent the EU from developing inter-institutional cooperation, or if new institutions reject EU participation, the EU could be worse off (Koops, 2016). Determining whether the EU benefits or not from complexity must be assessed

case-by-case and the purpose of this article is to develop a theoretically informed explanation of why variation is likely to exist.

Regime complexity increases when new actors are incorporated and power relations are altered, accepted rules of appropriate behaviour become ambiguous, alternative sources of authority emerge, or competing institutions claim legitimacy. Weaker actors benefit from establishing new institutions that follow alternative agendas, have more accommodating power structures, or propose alternative rules and norms of cooperation (Morse & Keohane, 2014). The relative weakness of new institutions in comparison to established ones representing the interests of the powerful is not a hindrance to mobilising support for change and questioning the status quo. Is the EU an advocate of change, or a beneficiary of existing power relations? While it sees itself as progressive in terms of promoting human rights, sustainability, democracy and the rule of law, international development, and an open trade regime, critics note the Eurocentricity of these values and the structures that perpetuate the wealth and power of the advanced industrial economies (Diez, 2005; Keukeleire & Lecocq, 2018; Onar & Nicolaïdis, 2013).

Greater regime complexity arising from challenges to European norms and values is potentially disadvantageous to the EU. Alternatively, if the EU can gain access to the institutions that seek change, it may be able to leverage its legal, bureaucratic, and diplomatic resources to work across multiple institutions in parallel, capitalising on forum shopping, rule ambiguity, as well as bargaining and side payments, thus demonstrating the opportunities for powerful actors to gain from complexity (Drezner, 2009).

This article asks two questions centred on this puzzle. Firstly, what role does the EU play in expanding a regime complex? To answer this question, this research shows how the EU altered the framing of the death penalty, supported advocacy groups, and promoted normative contestation. The second question is: To what extent does the EU win or lose from increased complexity? To answer this, it proposes differentiating between "institutional-architectural" benefits, consisting of enhanced access to governance institutions (e.g., those created by increased informality), and "output-outcome" benefits materialising from policy changes as a consequence of the new agenda, alternative sources of legitimacy, and power dynamics engendered by increased complexity.

Synthesising the answers to both questions yields four potential outcomes, ranging from maximally identifying the EU as an actor that shapes complexity to its advantage, to minimally seeing the EU as a passive observer of changing regime complexity that is driven by others and renders it worse off. In between, it either advances complexity but does not benefit from it or it cannot impact on a regime but the actions of others make it better off.

This article proceeds in four sections. It begins by establishing why the abolitionist movement is an important case to study the process of increasing regime complexity. The next identifies EU action in three areas that have driven capital punishment's insertion into the human rights regime complex. Afterwards, it examines whether the EU wins or loses from these changes. The final section presents the conclusions of the previous ones.

2. How Has the Abolitionist Movement Increased the Complexity of the Human Rights Regime?

How and why is the transnational effort to frame the death penalty as a human rights issue an example of international regime complexity? The "starting insight of international regime complexity literature is that global governance today seldom starts with a blank slate," complexes develop when new policy areas emerge, and "existing institutions convene sub-groups of policymakers to figure out whether existing policies or something new is needed" (Alter, 2021, p. 3). By contrast, the human rights implications of capital punishment were first raised in the UN in 1984, in a Economic and Social Council Resolution guaranteeing the rights of those facing execution (United Nations, 1984). These rights were addressed at the regional level by optional protocols in the European Convention on Human Rights (Protocol 6 adopted in 1983 and entered into force in 1985) and the American Convention on Human Rights (Protocol to the American Convention on Human Rights to Abolish the Death Penalty adopted in 1990 and entered into force in 1991).

What makes the case worth studying is how efforts to make the death penalty a human rights issue reconfigured the regime, forcing the inclusion of new actors and institutions, and forging links between existing components. Within the context of the thematic issue, it is an important case because of the EU's stated ambition to be a leading advocate for the abolition of capital punishment globally (Council of the European Union, 2013) and was a demonstrative example chosen for "normative power Europe" (Manners, 2002). Given this long-standing goal, it is selected as a likely case demonstrating the impact of EU action on the process of increasing regime complexity to assess the extent to which changes further EU goals.

The use of the death penalty is regulated in international law by article 6 of the International Covenant on Civil and Political Rights (ICCPR) and limits its application to only the most serious crimes, demanding that the correct judicial processes are followed and provisions for appeal are provided. How exactly these obligations are fulfilled is decided by national laws and, frequently, retaining the right to execute is aligned with the staunch assertion of state sovereignty and defending the principle of non-interference in domestic politics. Retentionist states argue that ICCPR's article 6 permits capital punishment and abolitionists may take the additional step of ratifying the Second Optional Protocol (committing a

state to abolition) if they so choose. However, in 2018, the UN Human Rights Committee published General Comment 36 pertaining to article 6 and opined a strongly abolitionist reading.

The study begins in July 1991, when the Second Optional Protocol entered into force and the human rights regime established a legal authority (as of December 2022, 90 UN members have ratified it), and ends with the analysis of reports issued in 2021. However, for a considerable period of this time, retentionist states sought to silence efforts to discuss capital punishment by claiming that it remained a domestic legal issue and not a human rights one in institutions across the human rights regime, including the Human Rights Council (HRC), Commission on Human Rights, and the General Assembly of the United Nations (UNGA) Third Committee (cultural, social, and human rights).

In 1994, the Italian government failed in its attempt to pass a resolution calling for the abolition of the death penalty in the UNGA Third Committee. The draft text was withdrawn before the final committee vote for fear of being passed with amended text that strengthened the retentionist position (Bantekas & Hodgkinson, 2000). Italy, Finland, and Austria (the latter two in the capacity of rotating EU presidency) succeeded in having the UN Commission on Human Rights adopting resolutions calling for the abolition of the death penalty in 1997, 1998, and 1999 respectively, building on a more concerted effort to promote human rights through EU foreign policy and specifically advocating against the use of capital punishment (Smith, 2006).

While the justification for presenting capital punishment as a human rights issue drew in part on regional conventions, UN-level action inspired regional-level action too, such as the African Commission on Human and Peoples' Rights Resolution urging states to envisage a moratorium on the death penalty in 1999 (Resolution 42/XXVI/99), and more recently the 2014 Cotonou Declaration aspiring to make Africa an abolitionist continent. In the non-governmental sphere, the transnational World Coalition Against the Death Penalty was founded in 2002 by bringing together over 160 civil society groups (including long-term campaigners such as Amnesty International) to lobby for change. There are also hybrid governance institutions such as the International Commission Against the Death Penalty (ICDP) which is "an independent body of politically influential people with international standing—supported by a diverse group of 23 governments from all world regions—working to free the world from the death penalty" (ICDP, n.d.).

The creation of the HRC, in 2006, sets back EU efforts with consecutive failures to secure sufficient support for abolitionist resolutions due to reweighted regional representation (Smith, 2010), which led to a forum shift to the UNGA Third Committee. While ultimately less ambitious (calling for a moratorium instead of abolition), resolutions in the UNGA were passed in 2007, 2008, and biennially since then. Rule ambiguity has therefore increased because the majority of UN member-states accept that capital punishment is a human rights issue. More recently, the HRC and the Office of the High Commissioner for Human Rights (OHCHR) have convened high-level panels (HLPs) to discuss the death penalty (2014, 2015, and biennially thereafter), and have actively sought the inclusion of abolitionists from national parliaments, the judiciary, civil society, and epistemic communities to address meetings. The HLPs have increased the heterogeneity of actors advocating abolition, as well as consolidating capital punishment in the human rights regime by arguing its use constitutes torture (discussed in detail afterwards). As evidence of how far the death penalty has moved from the periphery to the centre of the human rights regime, one can compare the arguments presented in the UNGA Third Committee against accepting it as a human rights issue (United Nations, 2007) and UNGA plenary statements by retentionists, such as Papua New Guinea from 2016 onwards, conceding that they "accept that the death penalty is primarily a human rights issue" (United Nations, 2016b, p. 30).

In summary, over around 25 years, capital punishment moved into the human rights regime to become a central issue within the regime. Four indicators of complexity noted in the literature are present in this case: (a) regional rules on application overlap with efforts to establish international rules; (b) increased number of institutions; (c) memberships overlap and different elemental institutions refer to the decisions and actions of other institutions to elaborate their positions; and (d) retentionist arguments about the legality of the death penalty are refuted, evidencing the weakening of a legal hierarchical order (Eilstrup-Sangiovanni & Westerwinter, 2021).

3. What Has the EU Done to Increase Human Rights Regime Complexity?

This section focuses on the first research question concerning the death penalty shifting from outside to inside the human rights regime and what role the EU played in it. The process of incorporating new actors into the complex created ambiguity in previous rules regarding capital punishment by framing it as aligned with cruel treatment and torture. It also drew on regional organisations and their efforts to restrict the use of the death penalty, which simultaneously emphasised new authoritative institutions regarding rule interpretation. While the EU played a significant role in its own region, the CoE and its European Court of Human Rights have historically been the primary institutions in this field, with robust legal provisions outlawing the death penalty in the European Convention on Human Rights (Protocols 6 and 13). Although there was a period of mutual suspicion between the EU and the CoE in the early 2000s, when the latter's preeminent position protecting human rights

across Europe appeared under threat, national governments intervened to ensure the CoE's position was not challenged (Schumacher, 2012).

This article utilises a qualitative analysis of five series of authoritative texts spanning the period from 2006 (creation of HRC) to 2021 to identify and map the presence of new actors within the human rights regime and measure their contribution to the process of redefining the rules governing capital punishment. The first texts were the annual reports on the "question of the death penalty" of the Secretary-General to the HRC (16 documents from 2006–2021).

The second set was the *Moratorium on the Use of the Death Penalty: Report of the Secretary-General* to the UNGA (seven documents from 2008–2020). Although these are UN-authored reports, the submissions received are from states, regional organisations, civil society groups, and experts, and document the spectrum of activities undertaken by all actors contributing to the regime. These were used to identify regional and international actors discussing rules applied to the death penalty, facilitating its insertion into the human rights regime.

The third set was the HLP's discussions organised by the OHCHR on behalf of the HRC, which reported proceedings of meetings at which national, regional, and international representatives, from governments, civil society, advocacy groups, and legal and criminology experts, argued for greater restrictions on the use of the death penalty (five documents from 2014, 2015, 2017, 2019, and 2021).

The fourth set was the annual *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* reports to both the HRC and UNGA (32 documents from 2006–2021).

Finally, the fifth set was the annual *Special Rapporteur on the Extrajudicial, Summary, or Arbitrary Executions* reports to both the HRC and UNGA (32 documents from 2006–2021).

The latter two sources document the increased interest special rapporteurs showed in capital punishment as it was incorporated into their mandates. It also surveyed EU documents related to abolitionist activities to identify the scope of EU actions and their impact, authored by the Council of Ministers, the European Union External Action Service (EEAS), the European Parliamentary, and the European Court of Auditors. Verification and triangulation were conducted to ensure information was accurate, either by visiting websites or using secondary literature.

Three EU actions were identified and examined: (a) framing capital punishment as closely aligned with prohibited human rights violations such as torture; (b) funding national and regional advocacy against capital punishment; (c) normative challenges to the legitimacy of capital punishment. Each type of action is an example of an established strategy used by social movements, norm entrepreneurs, or other actors recognised in the literature. A brief theoretical contextualisation is provided for each one, followed by empirical evidence of EU action.

3.1. Death Penalty as a Form of Torture

The study of social movements has observed how activists try to capture motivated supporters of one political issue (known as a "sentiment group") to strengthen support of another position through the action of "framing" (Snow et al., 1986). Four distinct modes of framing exist—bridging, amplification, extension, and transformation—capturing the strategies necessary to link issues of varying similarity. The linkage of the death penalty to other grave violations of human rights took place through frame amplification, namely the "identification, idealization, and elevation of one or more values presumed basic to prospective constituents but which have not inspired collective action for any number of reasons" (Snow et al., 1986, p. 469).

The report of the special rapporteur for torture and other cruel, inhuman, or degrading treatment or punishment explicitly details how the framing of capital punishment and cruel or degrading punishment (later extended to torture) emanated from an intervention by the EU in 2007:

> During the interactive dialogue on the report of the special rapporteur (A/63/175) before the General Assembly, the representative of France, on behalf of the EU, asked whether or not the death penalty was compatible with the prohibition of cruel, inhuman or degrading punishment under international law. (United Nations, 2008, §29)

The intervention by the EU was extremely significant because it pinpoints the first effort to mobilise opposition to cruel, inhuman, or degrading punishment into opposition to the death penalty through a framing strategy, and later by amplification, to frame the death penalty as torture.

This was institutionalised by incumbent special rapporteurs in the following years. In direct response to the EU question, special rapporteur Manfred Nowak wrote a long and wide-ranging discussion of legal trends and jurisprudence addressing the question because no one has asked him this before (United Nations, 2018, pp. 7–13). Nowak's replacement, Juan E. Méndez, said that considering "whether the death penalty…constitute[s] per se cruel, inhuman or degrading treatment or punishment" would be an objective during his tenure (United Nations, 2011, §70). In 2018, Nils Melzer wrote in his report to the UNGA that "it is the considered view of the special rapporteur that the circumstances accompanying the practice of the death penalty…cannot be reconciled with the prohibition of torture" (United Nations, 2018, §44).

The framing of the death penalty as torture first appeared in the 2016 report of the *Special Rapporteur*

on Extrajudicial, Summary, or Arbitrary Executions, when Christof Heyns stated that "the death penalty constitutes torture, cruel, or inhuman treatment" (United Nations, 2016a, §40), and again in 2021 when Morris Tidball-Binz warned of the "impact of the death penalty on the dignity and rights of human beings, including the right not to suffer torture or other cruel, inhuman or degrading treatment" (United Nations, 2021, §58). These statements demonstrate that the frame initially proposed by the EU in 2008 has been accepted and legitimised at the UN level.

How has the EU contributed to consolidating this framing process? Most important is the fact that the EU began the process of framing capital punishment as incompatible with the prohibition of cruel treatment and torture in 2007. Its own guidelines for external action on matters related to capital punishment set out in 2013 repeatedly refer to the issue of torture, and, similarly, the EU's guidelines on responding to torture (published in 2012 and updated in 2019) should be read in conjunction with each those of the death penalty (Council of the European Union, 2019).

In 2017, a joint EU, Argentina, and Mongolia initiative established the Alliance for Torture-Free Trade (https://torturefreetrade.org) alongside 57 co-signatories committed to placing controls on the export of goods that could be used for torture or the death penalty. This builds on the action taken by the EU in 2005 to restrict the manufacture by European pharmaceutical firms of drugs used in lethal injection executions (Council of the European Union, 2013). This ban resulted in alternative methods of execution being used which were deemed crueller (such as firing squad), thereby making it harder for retentionist states to justify their continued use of capital punishment.

In summary, the consolidation of the death penalty within the human rights regime complex was aided by framing the death penalty as incompatible with the prohibition of torture. The uncontested nature of the torture prohibition simultaneously drew capital punishment closer to human rights monitoring bodies and led to the two special rapporteurs taking an ongoing interest in the issue. All the while, retentionist critics found it harder to defend their use of the death penalty because it implied defending the practice of torture. The EU was instrumental in this change occurring. Consequently, complexity increased through greater ambiguity over the previously established legality of capital punishment and new actors crowded the space that was previously limited by the prerogative of non-intervention in the domestic legal affairs of states.

3.2. Funding National and Regional Advocacy Against Capital Punishment

Civil society advocacy groups operate transnationally to promote policy change in a wide range of issues, including opposing capital punishment. They can either work in a bottom-up manner, as described by Keck and Sikkink (1997/2014) in their study of transnational advocacy networks. Alternatively, they can work in a top-down manner upon receiving an invitation from formal international organisations to enter meetings, allowing them to lobby states on issues such as legislation or compliance verification and monitoring. The EU boosted civil society activism against the use of the death penalty through funds allocated using the (now replaced) European Instrument for Democracy and Human Rights (EIDHR), which, in 2014, became aligned with key EU foreign policy objectives, including combatting torture and the death penalty. Between 2014 and 2017, the EU awarded over €17M to 33 competitively awarded grants (European Court of Auditors, 2015). In the opinion of the external evaluation of the EIDHR, "almost all projects under the EIDHR contain at least some elements of awareness-raising, advocacy, and lobbying—both at the global level…and at the national and local levels" (Moran et al., 2017, p. 47).

One example of EU funding to a civil society advocacy group is the Ensemble Contre la Peine de Mort (ECPM), the organiser of seven World Congresses Against the Death Penalty and three regional conferences (Rabat in 2012, Kuala Lumper in 2015, and Abidjan in 2018). In 2021, the EU contributed €248,901 to the organisation, amounting to nearly 18% of the operating budget. In both 2019 and 2020, the EU, the European Parliament, and the OIF contributed a total of around €900,000 (50% of the total income), the increase reflecting the hosting of the seventh World Congress at the European Parliament, in Brussels. Between 2009 and 2018, the EU and the Organisation internationale de la francophonie (OIF) contributed between €100,000 and €500,000 annually (publicly available data does not disaggregate between international organisations), in addition to EU member-states' direct contributions (Ensemble Contre la Peine de Mort, 2020). This example is significant because the ECPM is one of the most important single-issue advocacy groups addressing the death penalty and its world congresses serve as important platforms for pressing national and regional actors for change. At the level of the member-states, the Community of Portuguese-Speaking Countries passed their first resolution to abolish the death penalty in 2003 (United Nations, 2014, §50) and formed the basis of the ten-state cross-regional group of authors for the 2007 UNGA resolution (Kissack, 2010). Spain was instrumental in founding the ICDP in 2010. These examples illustrate the EU mobilisation of political support for generating local advocacy promoting regional-level institutional change.

3.3. Normative Challenges to the Legitimacy of Capital Punishment

After the initial framing steps tying the death penalty to human rights, followed by catalytic funding of civil

society activism to consolidate the position, the third EU action promoted arguments against the death penalty in diplomatic communications. The EU has consistently taken the stance in its official documents that capital punishment is not compatible with respect for international human rights law.

The EU uses highly consistent language in its demarches condemning executions in retentionist states, as well as in praising steps taken towards moratoriums or abolition. Between 2013 and 2021, demarches deviate only slightly from the accepted text stating that they:

> Consider the death penalty to be a cruel and inhumane punishment, which is not a deterrent to criminal behaviour and which represents an unacceptable denial of human dignity. With capital punishment any miscarriage of justice—which can happen in any legal system—is irreversible. (European Union External Action, 2014)

This example is from a 2014 demarche against Bangladesh and can be compared to examples of other statements. The EU praised Mongolia's abolition of capital punishment in 2015 stating that "capital punishment is a cruel and inhuman punishment which fails to deter criminal behaviour and which represents a grave denial of human dignity and integrity" (European Union External Action, 2015). Five years on, in response to the hanging of a 29-year-old man convicted of murder in Botswana, the EU issued a joint statement with Australia and Canada declaring that the "death penalty is a cruel and inhumane punishment, which fails to deter criminal behaviour and which represents a grave denial of human dignity and integrity. Any miscarriage of justice—which is an inherent risk in any legal system—is irreversible" (European Union External Action, 2020). The language is consistently used when addressing Japan (European Union External Action, 2016) or the US (European Union External Action, 2018), demonstrating minimal variation between Global North and Global South retentionist states. While there was consistency over time in terms of the framing, the EU also incorporated some arguments taken from the central themes of the HLP discussions, including the repeated focus on the lack of the deterrent effect, the risk of irreversible miscarriages of justice, and the denial of dignity.

EU statements on the death penalty in third states drew on heightened ambiguity in the rules governing capital punishment and the composition of authoritative actors making normative statements about its use. Widely recognised mechanisms linking individuals to changing state behaviour such as norm entrepreneurship (Finnemore & Sikkink, 1998) and epistemic community consultation (Haas, 1992) were evidenced. The HLP discussions were an important forum for abolitionist advocates to give a platform in a UN institution to legal experts, civil society groups, regional organisations, and national government officials to discuss the specific human rights dimensions related to capital punishment, such as considering the impact on minors or protection of minorities.

More widely across the regime complex, legal expert opinion has been instrumental in reframing the relationship between sovereignty and rights, arguing that respecting human rights in domestic law is an affirmation of sovereignty expressed as a freely chosen commitment to comply (United Nations, 2017). This argument is expressed most clearly in the amendments to the UNGA resolutions passed in 2016, 2018, and 2020, that frame respecting sovereignty as integral to successful multilateralism rather than previous efforts, between 2007 and 2014, which sought to include references to sovereignty as the antithesis of human rights universalism.

Recently, the EU's position has been echoed by the 2018 General Comment 36 of the Human Rights Committee, reflecting contemporary legal opinion about article 6 of the ICCPR. This article was previously interpreted by retentionist states as justifying the continuation of capital punishment in the absence of an affirmative decision to ratify the Second Optional Protocol. General Comment 36 concludes that the spirit of the article is that abolition is the long-term objective and that sovereigntist objections were foreseen as being transitory and not permanently valid (Méndez, 2012). The superiority of rules governing the death penalty emanating from sovereign statehood was placed in doubt as the inviolability of the right to life was more forcefully associated with capital punishment.

4. Has the EU Benefitted From Increased Regime Complexity?

This section focuses on the second research question asking to what extent the EU wins or loses from increased complexity. Figure 1 shows the increased complexity of the human rights regime complex as the death penalty, in part through its framing as a cruel punishment and also through global advocacy, has drawn in more institutions. The global abolition of the death penalty has been a major foreign policy objective of the EU for two decades. It is still far from being realised, with around 20–30 states resolutely retaining their right to execute, with China, Iran, Iraq, Egypt, and Saudi Arabia conducting over 90% of annual executions. However, the global trend undoubtedly favours the abolitionist movement, with Amnesty International reporting 483 executions in 2020, significantly reduced from 2148 in 2005. Likewise, in 2020, 144 states are deemed abolitionists in law or practice, up from the 130 reported in 2007 (Amnesty International, 2021).

To this end, bringing the death penalty into the human rights regime has coincided with a drastic reduction in the use of capital punishment and the EU's policy goal has been advanced. While the previous section set out three EU actions that facilitated increased regime complexity, it is important to acknowledge possible

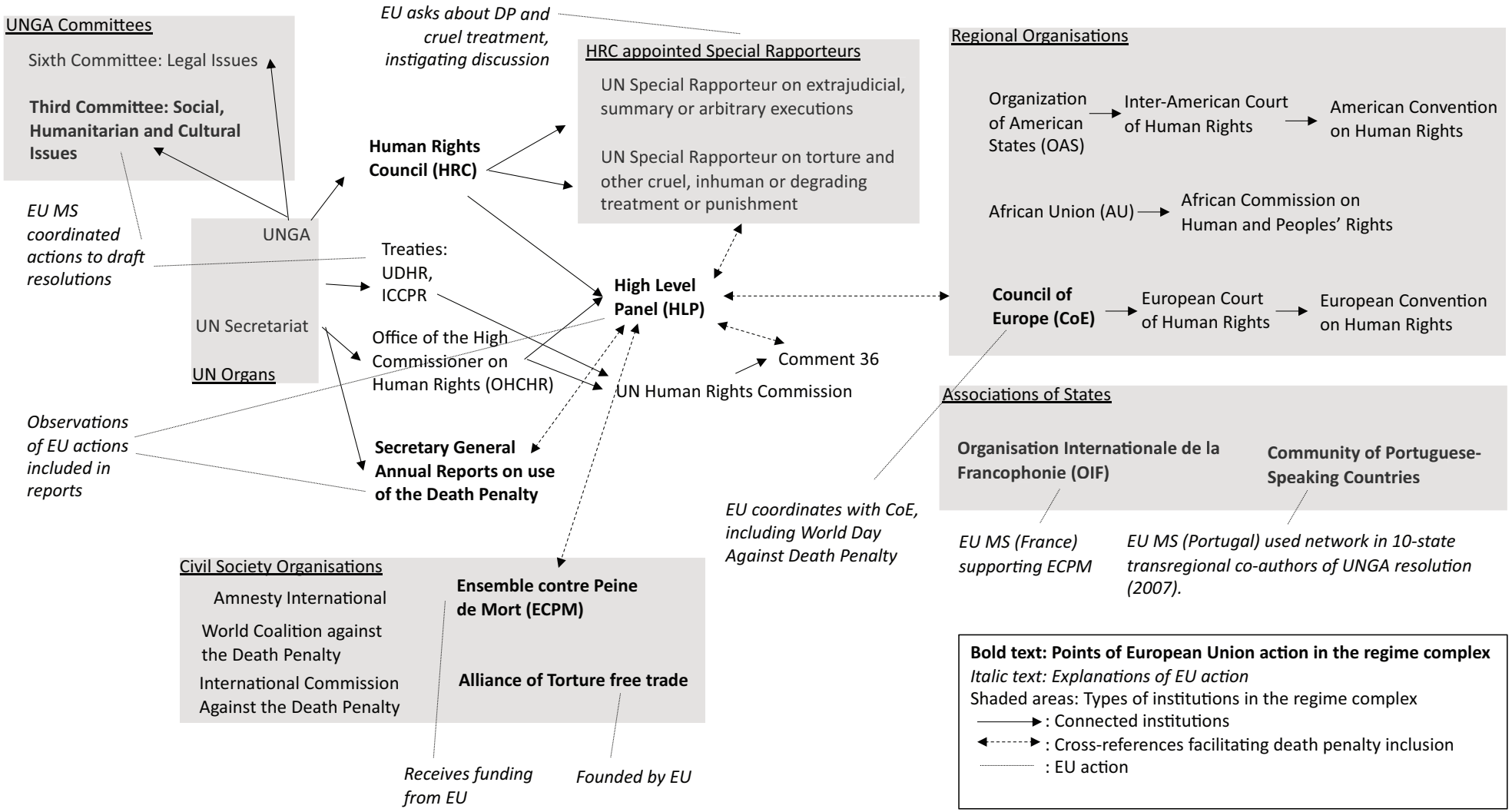

Figure 1. Human rights regime complex with death penalty included.

exogenous factors beyond the scope of this study that also contributed to the abolitionist trend, such as economic development and rising income, democratisation, or domestic activism (Kim, 2016; McGann & Sandholtz, 2012; Neumayer, 2008). An analytical framework to measure the benefits accrued to the EU and determine the extent to which it is a "winner" is therefore necessary.

The first issue to consider is whether increased regime complexity yields "institutional-architectural" benefits (is the EU able to politically participate in the regime complex?) or "output-outcome" benefits (are the EU's foreign policy goals furthered by the regime complex?). The two types are not a priori assumed to be mutually exclusive. The second issue draws on theories of international cooperation and considers whether benefits are public or private and if public, either excludible or non-excludible. A third, and related consideration, is that framing the death penalty as a human rights issue and furthering its abolition, may be considered a public "good" to actors sharing the same normative standards as the EU; to retentionist states, these actions likely constitute a public "bad." The liberal orientation of EU foreign policy aims that they are non-excludable and provide public goods (from the EU's perspective), echoing Smith's (2014) analysis of the EU's external action through the lens of Wolfers' possessive versus milieu goals.

In Section 2, four indicators of complexity were identified: (a) overlapping rules creating ambiguity; (b) increased number of institutions; (c) membership overlap and institutions referencing the positions of others; and (d) weakening legal hierarchical order. This article now considers examples of each in turn.

Rule ambiguity increased as more institutions sought to bind their members to rules that differ from rules previously regarded as authoritative. In this case, regional organisations (including the EU and CoE) with stricter rules on capital punishment catalysed increased ambiguity. Another mechanism observed was the incorporation of new actors into the regime complex that contested the legitimacy of established rules, such as special rapporteurs, HLP discussions, and the legal experts' reasoning in General Opinion 36 regarding article 6 of the ICCPR. Collectively, these sources claimed an abolitionist trend was emerging within the international community. The EU is one of many like-minded actors that benefitted from ambiguous rules through the policy outcomes made possible.

The increased number of institutions in the regime complex provided more opportunities for a diverse range of actors to either engage directly through participation or indirectly by informing discussion points. Activist data gathering and legal experts' opinions informed the reports written by the special rapporteurs, who have become more prominent in the debate. The EU benefitted from architectural changes, such as the HLP, offering the EU direct participation in the abolitionist conversation after 2014. These benefits are non-excludible to other actors, meaning the EU is not alone in receiving increased access opportunities.

Closely linked to the rise in the number of institutions was the increased tendency for institutions to refer to the decisions and actions of others within the complex to justify their positions, creating feedback loops and transferring norm entrepreneurship from one part of the complex to another. The text of UNGA resolutions elaborated biennially, the advancements elsewhere in the complex, and recommendations by special rapporteurs were incorporated into HLP discussions, which in turn referenced regional organisations' legal frameworks regulating capital punishment and civil society organisation advocacy. These routes into formal resolutions and UN reports, while not binding on UN members, served the EU and like-minded abolitionists' interests by making opposition to the human rights-based arguments against the death penalty systematically more difficult to ignore.

Finally, there was a clear process of weakening the hierarchy within the legal order that placed the sovereign state's right to use capital punishment for the most serious crimes above the right to life. Throughout the study, retentionist states' acceptance of the human rights dimension was documented (e.g., UNGA statements) and the wider human rights violations implicit in capital punishment were articulated. The EU, in its foreign policy position towards abolition, the language of its demarches and press statements, and through the criteria for awarding EIDHR grants, treated capital punishment as a human rights issue, that was often mentioned in association with cruel punishment or torture. The EU's actions contributed to these outcomes and its policy preference gained legitimacy from UN authority, benefitting it considerably.

In summary, all four mechanisms through which regime complexity increased yielded benefits to the EU. Two were examples of institutional-architectural benefits (number of institutions and membership overlap) and two were examples of output-outcome (rule ambiguity and weakening legal hierarchy). Yet in all four cases, the benefits were not exclusively for the EU, with other abolitionist-favouring actors—be they states, regional organisations, or civil society groups—benefitting too. Also significant was the observation that the EU's increased actorness and improved influence came about in a manner that the existing literature on EU actorness would have difficulty identifying. There the focus is on the willingness (or not) of EU member-states to pool sovereignty and accept collective representation, coupled with legal obstacles presented by UN bodies and agencies that limit membership to sovereign states. There is a tendency to regard EU "wins" in a zero-sum relationship with its own member-states or other members of international organisations forced to concede a voice, a vote, or a chair, echoing the distinction between possessive and milieu goals. Using the lens of regime complexity to observe the process of regime change, a more nuanced understanding is developed of

how the EU exerted influence across several different institutions, thus yielding benefits that were not won from concessions.

5. Conclusion

This article examines the process by which abolitionists incorporated capital punishment into the global human rights regime between 1991 and 2021, thereby ending its treatment as an exclusively domestic legal issue. The case was chosen because the EU has long advocated for the complete abolition of the death penalty as a central goal of its foreign policy, increasing the likelihood of obtaining positive results in order to develop a more general theoretical contribution.

Two questions guided this study. How has the EU acted to increase the complexity of the human rights regime and to what extent has it benefitted from that process? Through the analysis of primary and secondary sources, three EU actions were identified as contributing to heightening complexity.

First, the EU questioned the UN special rapporteur on torture about whether capital punishment constituted cruel punishment, thus initiating a powerful framing process binding the regulation of the death penalty with the prohibition of torture.

The second was the EU's funding of civil society organisations working toward global abolition (including €17M between 2014–2017), serving to promote transnational advocacy networks driving domestic (bottom-up) pressure to reform, as well as gaining representation in UN-level activities such as HLP.

Third, demarches and statements to third states promoted new normative thinking developed across the regime complex, doubting the compatibility of capital punishment and the right to life. Examples of EU benefits from these actions were given and, in all cases, the benefits did not accrue exclusively to the EU, but also to other actors engaged in abolition advocacy.

By simplifying the first answer to say whether or not the EU significantly acted upon the regime to affect its complexity and the second question to a binary assessment of winning or losing, a two-by-two matrix is developed with question one represented in rows and question two in columns. The four outcomes are (NW) both affirmative, (NE) affirmative-negative, (SW) negative-affirmative, and (SE) both negative. The first outcome results in an assessment of actorness as high, while the fourth, by contrast, is low. The mixed results point to a compromised actorness—either a failure to achieve the desired outcome or a favourable outcome attributable to the work of other actors. Table 1 takes on actorness and is done for illustrative purposes—for a detailed analysis see Jupille and Caporaso (1998), Bretherton and Vogler (2006), and Drieskens (2017).

The results identified in this article show the EU exhibiting notable actorness in the UN-centred human rights regime, but what is the wider significance of this result to other regimes? The study of EU actorness in formal institutions like the UN has tended to focus on legal and political representation (Gerhing et al., 2013). International organisation is becoming more complicated in design due to the rise of informal institutions (Roger, 2019; Vabulas & Snidal, 2013), the overlapping of mandates and memberships (Alter & Meunier, 2009), and "transnational new governance" (Abbott & Snidal, 2010).

Much of the literature studying the EU in the multilateral system has focused on formal IOs using the established toolbox of coordination, representation, and legal personality. Another direction has been the comprehensive study of regional organisations in the multilateral system as a type of actor in their own right (Panke et al., 2018).

The direction proposed in this thematic issue and operationalised in this article is to analyse processes of regime complexity change and assess the impact of the EU, and the outcome of its actions. As global governance institutions become denser and more varied, regime complexity will become an increasingly important field of study. Future lines of investigation are suggested to go beyond this article. Firstly, one could expand the analysis to other regimes. Secondly, to study issue areas previously outside of the human rights regime and their processes of incorporation (both successful and unsuccessful). A third would be a deeper dive into the agency of the EU by looking at the EEAS or the human rights working group of the Council. All three demonstrate the relevance of this research to the wider study of EU actorness in the global governance of the present day.

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Table 1. EU actorness across regime complexes.

	Does the EU benefit from increased complexity? (Q2)	
Do EU actions cause increase in complexity? (Q1)	Yes	No
Yes	High degree of actorness	Compromised actorness
No	Compromised actorness	Low degree of actorness

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References

Abbott, K., & Snidal, D. (2010). International regulation without international government: Improving IO performance through orchestration. *The Review of International Organization*, *5*(3), 315–344. https://doi.org/10.1007/s11558-010-9092-3

Alter, K. J. (2021). The promise and perils of theorizing international regime complexity in an evolving world. *The Review of International Organizations*, *17*(2), 375–396. https://doi.org/10.1007/s11558-021-09448-8

Alter, K. J., & Meunier, S. (2009). The politics of international regime complexity. *Perspectives on Politics*, *7*(1), 13–24.

Amnesty International. (2021). *Death penalty 2021: Facts and figures*. https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures

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

Barnett, M., Pevehouse, J. W. C., & Raustiala, K. (Eds.). (2021). *Global governance in a world of change*. Cambridge University Press. https://doi.org/10.1017/9781108915199

Bretherton, C., & Vogler, J. (2006). *The European Union as a global actor*. Routledge.

Council of the European Union. (2013). *EU guidelines on the death penalty* (8416/13). https://data.consilium.europa.eu/doc/document/ST-8416-2013-INIT/en/pdf

Council of the European Union. (2019). *Guidelines on EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment* (12107/19). https://www.consilium.europa.eu/media/40644/guidelines-st12107-en19.pdf

Diez, T. (2005). Constructing the self and changing others: Reconsidering "normative power Europe." *Millennium: Journal of International Studies*, *33*(3), 613–636. https://doi.org/10.1177/03058298050330031701

Drezner, D. S. (2009). The power and peril of international regime complexity. *Perspectives on Politics*, *7*(1), 65–70.

Drieskens, E. (2017). Golden or gilded jubilee? A research agenda in actorness. *Journal of European Foreign Policy*, *24*(10), 1534–1546.

Eilstrup-Sangiovanni, M., & Westerwinter, O. (2021). The global governance complexity cube: Varieties of institutional complexity in global governance. *The Review of International Organizations*, *17*(2), 233–262. https://doi.org/10.1007/s11558-021-09449-7

Ensemble Contre la Peine de Mort. (2020). *Rapport d'Activités* [Activity report]. https://www.ecpm.org/app/uploads/2022/09/Rapact21-FR-100622-MD-Page.pdf

European Court of Auditors. (2015). *EU support for the fight against torture and the abolition of the death penalty* (Special Report No. 9). European Union. https://www.eca.europa.eu/Lists/ECADocuments/SR15_09/SR_TORTURE_EN.pdf

European Union External Action. (2014). *Statement by the spokesperson on capital punishment in Bangladesh*. https://www.eeas.europa.eu/node/6835_en

European Union External Action. (2015). *Statement by the spokesperson on the abolition of the death penalty in Mongolia*. https://www.eeas.europa.eu/node/3057_en

European Union External Action. (2016). *Joint local statement on execution in Japan*. https://www.eeas.europa.eu/node/14612_en

European Union External Action. (2018). *Statement by the spokesperson on the abolition of the death penalty in Washington State, USA*. https://www.eeas.europa.eu/node/52096_en

European Union External Action. (2020). *Joint local statement on the execution of Mr Mmika Michael Mpe*. https://www.eeas.europa.eu/eeas/joint-local-statement-execution-mr-mmika-michael-mpe_en

Finnemore, M., & Sikkink, K. (1998). International norm dynamics and political change. *International Organization*, *52*(4), 887–917.

Gerhing, T., Oberthuer, S., & Muehleck, M. (2013). European Union actorness in international institutions: Why the EU is recognised as an actor in some international institutions, but not in others. *Journal of Common Market Studies*, *51*(5), 849–865.

Haas, P. M. (1992). Introduction: Epistemic communities and international policy coordination. *International Organization*, *46*(1), 1–35.

International Commission Against Death Penalty. (n.d.). *Home*. https://icomdp.org/mandate-2

Jupille, J., & Caporaso, J. A. (1998). States, agency and rules: The European Union in global environmental politics. In C. Rhodes (Ed.), *The European Union in the world community* (pp. 213–229). Lynne Rienner.

Keck, M. E., & Sikkink, K. (2014). *Activists beyond borders. Activity networks in international politics*. Cornell University Press. (Original work published 1997)

Keukeleire, S., & Lecocq, S. (2018). Operationalising the decentring agenda: Analysing European foreign policy in a non-European and post-western world. *Cooperation and Conflict*, *53*(2), 277–295. https://doi.org/10.1177/0010836718766394

Kim, D. (2016). International non-governmental orga-

nizations and the abolition of the death penalty. *European Journal of International Relations*, *22*(3), 596–621.

Kissack, R. (2010). *Pursuing effective multilateralism: The European Union, international organisations and the politics of decision making*. Palgrave Macmillan.

Koops, J. (2016). Inter-organizationalism in international relations: A multilevel framework of analysis. In J. Koops & R. Biermann (Eds.), *Palgrave handbook of inter-organizational relations in world politics* (pp. 189–216). Palgrave Macmillan. https://doi.org/10.1057/978-1-137-36039-7_9

Laatikainen, K. V. (2010). Multilateral leadership at the UN after the Lisbon Treaty. *European Foreign Affairs Review*, *15*, 475–493.

Laatikainen, K. V., & Smith, K. E. (Eds.). (2006). *The European Union at the United Nations: Intersecting multilateralisms*. Palgrave Macmillan.

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.

Méndez, J. E. (2012). The death penalty and the absolute prohibition of torture and cruel, inhuman, and degrading treatment or punishment. *Human Rights Brief*, *20*(1), 2–6.

Moran, G., Devine, V., De Tollenaere, M., Visti, M., Ballesteros, L. P. R., Astre, A., & Buhl-Nielsen, E. (2017). *External evaluation of the European instrument for democracy and human rights* (2015/375168). European Commission. https://international-partnerships.ec.europa.eu/system/files/2019-09/eidhr-evaluation-final-report-volume-1-main-report_en.pdf

Morse, J. C., & Keohane, R. O. (2014). Contested multilateralism. *Review of International Organization*, *9*, 385–412.

Neumayer, E. (2008). Death penalty abolition and the ratification of the second optional protocol. *International Journal of Human Rights*, *12*(1), 3–21.

Onar, N. F., & Nicolaïdis, K. (2013). The decentring agenda: Europe as a post-colonial power. *Cooperation and Conflict*, *48*(2), 283–303.

Panke, D., Lang, S., & Wiedermann, A. (2018). *Regional actors in international negotiations: Active and successful?* Rowman and Littlefield.

Raustiala, K., & Victor, D. (2004). The regime complex for plant genetic resources. *International Organization*, *58*(2), 277–309.

Roger, C. (2019). *The origins of informality*. Oxford University Press.

Schumacher, B. (2012). The influence of the Council of Europe on the European Union: Resource exchange and domain restriction as venues of inter-institutional influence. In O. Costa & K. E. Jørgensen (Eds.), *The influence of international institutions on the EU* (pp. 186–206). Palgrave Macmillan.

Slaughter, A. (2004). *A new world order*. Princeton University Press.

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), 224–241.

Smith, K. E. (2014). *European Union foreign policy in a changing world*. Polity Press.

Snow, D. A., Burke-Rochford, E., Weldon, S. K., & Benford, R. D. (1986). Frame alignment processes, micromobilization and movement participation. *American Sociological Review*, *51*(4), 464–481.

United Nations. (1984). *Safeguards guaranteeing the protection of the rights of those facing the death penalty* (E/RES/1984/50).

United Nations. (2007). *Note verbale* (A/62/658).

United Nations. (2008). *Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (A/HRC/10/44).

United Nations. (2011). *Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (A/HRC/16/52).

United Nations. (2014). *Summary of the high-level panel discussion on the question of the death penalty* (A/HRC/27/26).

United Nations. (2016a). *Report of the special rapporteur on extrajudicial, summary or arbitrary executions* (A/71/372).

United Nations. (2016b). *General Assembly debate* (A/71/PV65).

United Nations. (2017). *Summary of the high-level panel discussion on the question of the death penalty* (A/HRC/36/27).

United Nations. (2018). *Interim report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (A/73/207).

United Nations. (2021). *Report of the special rapporteur on extrajudicial, summary or arbitrary executions* (A/76/264).

Vabulas, F., & Snidal, D. (2013). Organization without delegation: Informal intergovernmental organizations (IIGOs) and the spectrum of intergovernmental arrangements. *The Review of International Organizations*, *8*(2), 193–220.

Wouters, J., Hoffmeister, F., & Ruys, T. (Eds.). (2007). *The United Nations and the European Union: An ever closer partnership.* T.M.C. Asser Press.

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