

# How Alive Is the Anti-Death Penalty Norm? Evidence from the British and French Treatment of ISIS Foreign Fighters

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## Abstract

This article enhances our understanding of international norms by developing a set of indicators to measure norm robustness at the *domestic* level. We apply these indicators to assess the robustness of the prohibition on the death penalty: a well-established international norm that terrorism-related cases have put to the test. In the United Kingdom, the government agreed to share information with the United States, possibly leading to the imposition of the death penalty on two ISIS foreign fighters of UK origin. France facilitated the trials of French ISIS fighters in Iraq, where they were sentenced to death. While the UK government, under public and judicial pressure, reversed its decision to cooperate with US authorities, the French government failed to acknowledge its violation of the death-penalty ban. We conclude that the anti-death penalty norm is more robust in the United Kingdom than in France. This case demonstrates how established democracies might break international human rights norms, and it reveals the nuances of the norm-decaying process.

## Resumen

Este artículo amplía nuestra comprensión de las normas internacionales mediante el desarrollo de un conjunto de indicadores para medir la solidez de las normas a nivel nacional. Aplicamos estos indicadores para evaluar la solidez de la prohibición de la pena de muerte: una norma internacional bien establecida que ha sido puesta a prueba debido a los casos relacionados con el terrorismo. En el Reino Unido, el gobierno aceptó compartir información con Estados Unidos, lo que posiblemente llevó a la imposición de la pena de muerte a dos combatientes extranjeros del ISIS de origen británico. Francia permitió el juicio de combatientes franceses del ISIS en Irak, donde fueron condenados a muerte. Mientras que el gobierno británico, bajo presión pública y judicial, revocó su decisión de cooperar con las autoridades estadounidenses, el gobierno francés no reconoció su violación de la prohibición de la pena de muerte. Se concluye que la norma contra la pena de muerte es más sólida en el Reino Unido que en Francia. Este caso demuestra cómo las democracias establecidas pueden incumplir las normas internacionales sobre derechos humanos, y pone de manifiesto los matices del proceso de desvirtuación de las normas.

## Résumé

Le présent article enrichit notre compréhension des normes internationales en élaborant un ensemble d'indicateurs de mesure de la résistance des normes en politique intérieure. Nous appliquons ces indicateurs afin d'évaluer la résistance de l'interdiction de la peine de mort: une norme internationale bien établie, mais mise à l'épreuve par des affaires relatives au terrorisme. Au RU, le gouvernement

a accepté de partager des informations avec les États-Unis, qui ont peut-être conduit à la prononciation de la peine de mort pour deux combattants étrangers de l'État islamique d'origine britannique. La France a facilité les procès de combattants français de l'État islamique, à l'issue desquels ils ont été condamnés à mort. Tandis que le gouvernement britannique, soumis à une pression publique et judiciaire, est revenu sur sa décision de coopérer avec les autorités américaines, le gouvernement français n'a pas reconnu sa violation de l'interdiction de la peine de mort. Nous en concluons que la norme d'opposition à la peine de mort est plus robuste au RU qu'en France. Cet exemple montre comment des démocraties établies sont susceptibles de ne pas respecter des normes internationales en matière de droits de l'homme, tout en révélant les nuances du processus d'affaiblissement d'une norme.

**Keywords:** human rights, terrorism, international norms, death penalty

**Palabras clave:** derechos humanos, terrorismo, normas internacionales, pena de muerte

**mots-clés:** droits de l'homme, terrorisme, normes internationales, peine de mort

Human rights norms often face challenges from actors that refuse to comply with them or even seek to undermine them. That much is hardly surprising, especially when the challenging actors are nondemocratic or weakly democratic governments. More surprising are cases where established democracies, committed to human rights, backslide and violate fundamental norms enshrined in international and domestic law—raising questions about the norms' continued efficacy. One such case has received much attention: the George W. Bush administration's violation of the prohibition on torture as part of the War on Terror (McKeown 2009; Sikkink 2013; Birdsall 2016). In this article, we explore another case of two liberal democracies potentially implicated in breaking a fundamental human rights norm: the prohibition on the death penalty.

Our analysis speaks to a growing scholarly interest in norm robustness. While much of the norm research in IR focuses on emergence and diffusion, scholars have increasingly turned their attention to established norms under challenge: Have norms decayed and lost their influence? Or have they remained robust in the face of controversy (Panke and Petersohn 2012; Clark et al. 2018)? Research, however, has been hampered by a wide variation in the conceptualization of robustness, with some focusing on state practice and others emphasizing the discursive dimension. Recently, Deitelhoff and Zimmermann (2019) combined the two dimensions to produce a set of four indicators of norm robustness. These indicators can be usefully applied for assessing norm robustness at the international level, and we seek to develop and elaborate them further to capture norm robustness in the domestic arena—the site where established norms are sometimes challenged. The current study therefore builds on Deit-

elhoff and Zimmermann's conceptualization to derive a set of domestic indicators of norm robustness. These indicators allow us to paint a nuanced picture of the status of norms at the domestic level, and, importantly, they allow us to identify variation in norm robustness across countries.

We demonstrate the utility of our approach by examining the British and French dilemmas regarding the imposition of the death penalty on ISIS foreign fighters: Europeans who fought for the Islamic State in Iraq or Syria. While Britain and France did not impose the death penalty themselves, they bore certain responsibility for the death penalty as they assisted other countries that wished to execute the foreign fighters: the United States (in the case of Britain) and Iraq (in the case of France). While such assistance was inconsistent with the international norm against the death penalty, we find that the norm remained reasonably robust in Britain—where officials struggled with the idea of breaking the norm and considered alternatives to violating it. Facing a domestic backlash, British officials responded by suspending the cooperation with US authorities that might have resulted in the death penalty. In France, in contrast, the government did not even acknowledge that it was violating the death-penalty prohibition, and the domestic backlash was limited. Overall, we find that the anti-death penalty norm enjoys greater robustness in Britain than in France.

This study enhances and refines our understanding of norm dynamics in the domestic arena, offering tools for assessing norm strength and decay. This study also carries important implications for our understanding of the anti-death penalty norm—a fundamental norm of human rights. Much of the concern about the use of the death penalty focuses on countries such as China, Iran,

and Saudi Arabia which, alongside the United States, still practice this form of punishment. In Europe, however, the anti-death penalty norm seems to be deeply entrenched (Hammel 2010). Yet the present analysis demonstrates that, even in established European democracies, the norm against the death penalty might be weaker than one expects.

### Conceptualizing Norm Robustness at the Domestic Level

Norms go through a life cycle: they emerge and diffuse, gaining various degrees of commitment and compliance from states. Some norms decline and decay: they lose power, and their impact on state behavior weakens. The study of norm decline is often framed in terms of *robustness*: Do norms still hold influence, or has their status diminished and eroded in the face of noncompliance and contestation? The study of these questions raises serious empirical challenges, since norms are difficult to observe. The result is a wide variation among scholars in their conceptualization of robustness. Some measure robustness through the norm's ability to guide and shape state practice (e.g., Altman 2020). Other scholars argue that evidence of norm robustness comes from discourse: states' verbal acceptance of the normative standards. For example, treaty ratifications or rhetorical statements in support of the norm would indicate robustness (e.g., Ben-Joseph Hirsch and Dixon 2021). Reconciling these two approaches, Deitelhoff and Zimmermann (2019, 6) suggest that norm robustness should be evaluated through both practice and discourse: "A norm whose claims enjoy widespread verbal acceptance by norm addressees (validity), and which generally guides addressee actions (facticity), is said to be highly robust." More concretely, Deitelhoff and Zimmermann lay out a set of indicators for the assessment of norm robustness. Their discourse-based indicators include: (1) concordance with the norm, that is, the breadth of acceptance of the norm by states, as manifested, for example, in the number of ratifications. (2) Third-party reactions to norm violations. On the practice side, they include two additional indicators: (1) compliance: level of behavior consistent with the norm. (2) implementation: incorporation of the norm in policy papers, standards of international organizations, and domestic law.

This set of indicators may readily be used for the assessment of norm robustness at the international level. Indeed, much of the research to date examines norm robustness through state-level statements and behavior (Clark et al. 2018; Welsh 2019). Yet, as

Simmons and Jo (2019, 20–21) remind us, norms are not the exclusive domain of states, and it is essential to look beyond international resolutions and treaties for evidence of norm strength. In fact, norms are more robust when they claim diverse support: support from states as well as nonstate actors, including mass publics; support not only through international-level statements, but also through the views and actions of *domestic* actors and institutions.

Heeding this advice, we turn our sights to the domestic arena for evaluating norm robustness. Specifically, we examine the domestic political dynamic following a government's apparent violation of a well-established norm. We are certainly not the first to do so. Several studies have examined the domestic controversy surrounding the torture policy of the George W. Bush administration, including the reactions of Congress, the Supreme Court, and civil society (McKeown 2009, 17; Sikkink 2013, 162–63; Birdsall 2016, 184–85). In this article, we conduct a more systematic and comprehensive analysis of the domestic arena to assess whether a norm's violation signals its decay or whether the norm remains robust despite it being breached. We combine the two dimensions of practice and discourse, while adapting them to the domestic political setting. Furthermore, we point to *complicity* in norm violation as a warning sign of normative decay.

### Practice-Based Indicators

An assessment of norm robustness on the practice side typically looks at state behavior and its compliance with the norm (Búzás 2018). Going beyond compliance, we look at several additional aspects of the state's violation of the norm:

1. What was the state's role in the norm violation? Did the state itself violate the norm, or did it enable or facilitate the violation of the norm by another state (what we refer to as complicity in norm violation)? Generally, a state's own violation of the norm indicates greater norm weakness. But even if the state merely facilitated another state's violation of the norm, this can still indicate a loss of norm robustness—especially if the facilitating role involved action (e.g., providing information or resources that contributed to the norm violation), and if the violation by the other state was foreseeable.
2. Before committing the norm violation, did the government consider alternatives that would keep the norm intact? Violating the norm as a last resort, in

the absence of better options, would signal greater norm robustness than a violation preceded by little hesitation and no weighing of alternatives.

3. In the face of domestic criticism of the norm violation, did the government bring itself closer to compliance with the norm, or did it ignore the criticism? A pro-compliance effect of domestic criticism would signal greater norm robustness (Krain 2012).

## Discourse-Based Indicators

### Government Discourse

1. How did the government publicly defend its apparent violation of the norm? There are several possible lines of defense, including affirmation of the norm while presenting the violation as a justified exception, suggesting that another norm prevails over the violated norm, and challenging the norm itself or its applicability in the current case. The government might also fail to acknowledge the norm's violation altogether (cf. Shannon 2000; Clark et al. 2018). Defending the violation as a justified exception signals greater norm robustness, whereas challenging the norm or ignoring its violation indicates norm weakness.
2. To the extent that the government publicly expressed its acceptance of the norm, did this hold in internal deliberations as well? Or was internal rhetoric within the government less accepting of the norm? Concordance between the public affirmation of the norm and private deliberations would indicate greater norm robustness.
3. Did the violation of the norm face opposition from ministers or from the government bureaucracy? Norm violations that engender little or no resistance from ministers or the bureaucracy indicate a weaker norm, whereas violations that meet objections from within the executive branch signal greater robustness.

### Third-Party Reactions

1. *Parliament*: Did the norm violation face resistance from parliament? If so, did criticism come only from opposition parties or also from members of the ruling party? A stronger and broader parliamentary resistance indicates a more robust norm (Efrat and Tomasina 2018).
2. *Courts*: If the norm violation was challenged before the courts, did the courts express rhetorical support for the norm? Did they declare the norm violation

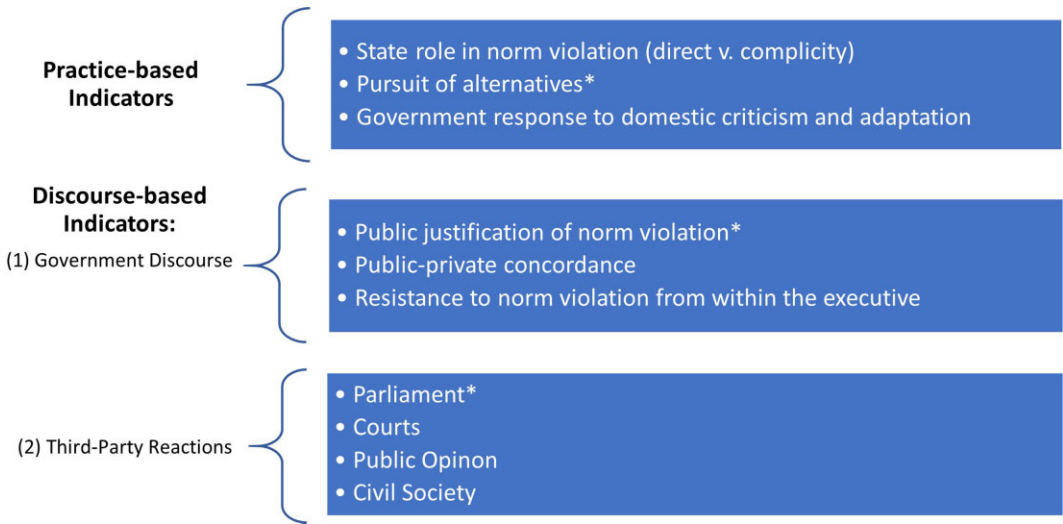
illegal? A judicial determination of illegality would signal greater robustness (Benvenisti 1993).

3. *Public opinion*: Did the public view the violation of the norm favorably or unfavorably? Greater disapproval of the norm violation, especially if manifested through public protest, would indicate greater norm robustness (Efrat 2018).
4. *Civil society*: Did the norm violation meet pushback from nongovernmental organizations (NGOs) or from public intellectuals (Hadden and Jasny 2019)? A stronger, broader resistance on the part of civil society indicates greater norm robustness.

The indicators we identify encompass various aspects of the norm violation: from the government's decision process to the responses of third parties. We recognize that, in a single case, the indicators could point in different directions: while some may signal the robustness of the norm, others might express weakness. The analyst should thus weigh the overall evidence to determine whether, on balance, the norm appears robust or whether it is decaying. While it is difficult to assign specific weight to each of the indicators, we propose that three indicators—one in each cluster—carry particular importance. Among the practice-based indicators, the pursuit of alternatives signals whether the norm played a meaningful role in the government's decision-making process. A government truly committed to a norm should make a serious, good-faith effort to avoid or minimize the infringement of the norm. If the government failed to even consider alternatives that are more consistent with the norm, this sends a strong signal of the norm's weakness and lack of a constraining effect. Among the government-discourse indicators, the justification of the violation signals how the government perceives the norm and its public status. Failure to even acknowledge the violation before the public attests to the norm's weakness. Among the reacting third parties, parliament holds a special place as a public arena for debating and challenging government policies that violate international norms. While not all cases of norm violation occupy the public or reach the courts, we do expect parliament to address important cases. Parliamentary indifference and a failure to seriously debate the violation of a norm would indicate its weakness. Figure 1 summarizes the domestic indicators of norm robustness.

## The Anti-Death Penalty Norm

The international norm against the death penalty has multiple rationales: the view of this punishment as cruel



**Figure 1.** Domestic indicators of norm robustness. An asterisk denotes the key indicator in each cluster.

and inhuman, its oftentimes unfair or discriminatory application, its irreversibility, and the lack of real benefit in deterring crime. This norm can be traced back to the 1948 Universal Declaration of Human Rights which establishes the right to life and prohibits cruel punishment (Articles 3 and 5). The norm was later enshrined in several international agreements, including the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and Protocols 6 and 13 of the European Convention on Human Rights (ECHR). Across countries, death-penalty abolition has expanded gradually throughout the twentieth century, with the 1990s witnessing a particularly heavy diffusion of the norm (Neumayer 2008; McGann and Sandholtz 2012). As of 2019, 106 countries had abolished the death penalty in law for all crimes; 142 countries had abolished the death penalty in law or practice (Amnesty International 2020).

Europe is the region most embracing of the anti-death penalty norm. With the exception of Belarus, all European countries have stopped using the death penalty. In the United Kingdom, the last execution was held in 1964. In 1969, capital punishment was abolished for murder; in 1998, it was abolished for the few remaining offenses to which it applied. The United Kingdom then gave added force to the death-penalty abolition by becoming a party to the ICCPR and ECHR protocols. Furthermore, the United Kingdom has been pushing for the abolition of the death penalty worldwide. In a document titled “HMG Strategy for the Abolition of the Death Penalty 2010–2015,” the Foreign Office explained that the United Kingdom, motivated by a concern for human rights overseas,

sought to increase the number of abolitionist countries—reflecting “the longstanding policy of the UK to oppose the death penalty in all circumstances as a matter of principle” (Foreign and Commonwealth Office 2011).

Like the United Kingdom, France joined the protocols to the ICCPR and ECHR that enshrine the death-penalty ban after abolishing this punishment in 1981. In 2007, the abolition of the death penalty was incorporated into the French Constitution.

But how robust is the commitment of Britain and France to the abolition of the death penalty? Let us examine their experience in treating returning terrorist fighters.

### The Death-Penalty Prohibition and ISIS Foreign Fighters: The British Dilemma

The Islamic State of Iraq and Syria—known as the Islamic State or ISIS—is a terrorist organization that follows a fundamentalist, jihadist doctrine of Sunni Islam. The organization won global attention in 2014, when it took over parts of Iraq and Syria and declared itself a caliphate. In the large territory it held, ISIS enforced a strict interpretation of sharia law and committed grave abuses of international human rights law, international criminal law, and international humanitarian law.<sup>1</sup>

1 First Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant. S/2018/1031, November 16, 2018.



This “success” drew flows of “foreign fighters” who flocked to Iraq and Syria from around the world to join ISIS. A 2018 estimate put the number of foreign affiliates of ISIS at 41,490, nearly half of them from the Middle East and North Africa. A total of 5,904 ISIS affiliates originated from Western Europe, including 1,910 from France and 850 from the United Kingdom (Cook and Vale 2018, 17). The weakening and defeat of ISIS in 2018–2019 put the foreign fighters on the policy agenda in Britain. Concerned about the security threat posed by the fighters, Britain was reluctant to allow their return. It similarly opted not to try them in British courts, arguing that anyone who fought for ISIS should face justice “in the most appropriate jurisdiction, which will often be in the region where their offences have been committed” (Sabbagh 2020).

But what if the most appropriate jurisdiction for prosecution might impose the death penalty? This dilemma arose in the cases of El Shafee Elsheikh and Alexandra Kotev: two Britons who joined the Islamic State in Syria and participated in the torture and killing of Western hostages, including through gruesome beheadings filmed and posted online. The two were captured in January 2018 by the American-supported Syrian Democratic Forces, a Kurdish-led militia (Goldman and Schmitt 2018). Recognizing the pair as a security threat and seeking to prevent their return to the United Kingdom, the Conservative government deprived them of their British citizenship. Furthermore, despite the strong connection to the United Kingdom—Elsheikh and Kotev had lived in London and, as part of ISIS, killed UK citizens—the British government declined to prosecute the two before UK courts (Haynes and Hamilton 2018; Townsend 2019). Yet, since some of their victims were American nationals, the United States expressed interest in bringing them to justice before US courts. To do so, American authorities required investigative information that their British counterparts had gathered about the pair. As per its usual practice, the United Kingdom requested a guarantee that the information would not be used in a legal process resulting in the death penalty. US authorities, however, declined to provide it. Under American pressure, the UK government decided, in June 2018, to transfer the requested information *without* the death-penalty guarantee—paving the way to the potential imposition of the death penalty (Riley-Smith 2018). The following analysis applies the domestic indicators of norm robustness to examine what this decision implies for the status of the anti-death penalty norm in the United Kingdom. While this case seemingly indicates the norm’s weakness, our analysis yields a more nuanced picture.

## Practice-Based Indicators

### *Direct or Facilitating Role in Norm Violation?*

This case did not involve a direct violation of the anti-death penalty norm by the United Kingdom: It was not the United Kingdom that might have imposed the death penalty on Elsheikh and Kotev. Rather, the controversy surrounded the United Kingdom’s possible facilitation of the imposition of the death penalty by another country. This takes away some of the severity of the norm violation by the United Kingdom. On the other hand, the United Kingdom’s facilitating role involved not just passive acceptance of the possibility of death-penalty imposition. Rather, the UK was willing to actively provide information necessary for a death sentence. And a rights violation was clearly foreseeable: the United Kingdom could certainly expect a possible imposition of the death penalty in a US legal process that would use the requested information. Britain was thus significantly involved in the potential violation of the norm, and this serves as evidence *against* norm robustness.

### *Pursuit of Alternatives*

We now lay out the UK government’s calculations—revealed in documents submitted to the courts—to examine why forgoing the death-penalty assurances was seen as the best available option.

In June 2015, prior to Elsheikh and Kotev’s capture, US authorities requested the United Kingdom’s legal assistance in investigating a group of UK-connected terrorists involved in the murder of US citizens in Syria. The American request was for evidence which UK police had gathered in the course of an investigation into this group. Two of the offenses the United States was investigating—homicide and hostage taking resulting in death—carried the death penalty. The Home Office was willing to accede to the legal-assistance request, but made it clear to the US Department of Justice (DOJ) that the United Kingdom “require[d], as a pre-condition to the provision of the assistance requested by you, that you provide a written undertaking that the death penalty will not be sought or imposed . . . against anyone found guilty of any criminal offence arising from this investigation and/or UK assistance provided” (*Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10, paras. 25–26 (hereafter *Elgizouli*)). The DOJ’s response, in March 2016, provided an assurance that fell short of what the United Kingdom had requested. While the United States agreed to not directly use evidence supplied by the United Kingdom to seek the death penalty, it left open the possibility of seeking the death penalty on the basis of other material which might have been generated as a result of the UK-provided information. When the Home Office

reiterated its request for a full assurance that would preclude the death penalty in this case, the United States indicated it would not provide such an assurance (*Elgizouli*, para. 29).

While this early episode demonstrated the United Kingdom's commitment to the death-penalty prohibition, things began to change in early 2018. The capture of Elsheikh and Kotey in January gave urgency to the question of their prosecution and focused attention on the British request for assurances. Importantly, the US administration had changed since the United Kingdom originally made the request for assurances. Senior members of the Trump administration now made clear their opposition to prosecuting non-American terrorist fighters in the United States. In their view, foreign fighters should face trial in their home countries, and the United States should not be left to assume responsibility for other countries' foreign fighters. This meant that, in the American view, it was the United Kingdom's responsibility to prosecute Elsheikh and Kotey. Furthermore, the strong message from the Trump administration, conveyed directly by US officials and through the UK embassy, was one of adamant opposition to the United Kingdom's seeking of death-penalty assurances: If the United Kingdom decided to shift the burden of prosecuting Elsheikh and Kotey to the United States, it should not tell US authorities how to handle the cases. Attorney General Jeff Sessions publicly expressed disappointment that "the British . . . are not willing to try the cases but tend to tell us how to try them" (*Elgizouli*, paras. 33–34, 37, 44, 56).

A threat accompanied the American frustration: DOJ officials indicated that if the United States was required to prosecute Elsheikh and Kotey, and the UK insisted on death-penalty assurances, the two might be transferred to Guantanamo bay rather than be tried in a US federal court (*The Queen (El Gizouli) v. Secretary of State for the Home Department*, [2019] EWHC 60 (Admin), para. 14). The clear purpose of the US pressure was to bring the United Kingdom to dilute or eliminate its request for death-penalty assurances (*Elgizouli*, paras. 34, 41–43, 46).

The intense American pressure put the UK government in a bind. The option favored by the United States—prosecuting Elsheikh and Kotey in the United Kingdom—contradicted the United Kingdom's reluctance to repatriate the foreign fighters (Townsend 2019). Yet the option favored by the United Kingdom—trying the two in a US federal court following death-penalty assurances—faced formidable challenges, as Attorney General Sessions indicated that the United States would not provide any form of undertaking. Moreover, British insistence could have backfired by sparking outrage from US officials, damag-

ing the bilateral relations between the United States and the United Kingdom, and paving the way to a transfer of Elsheikh and Kotey to Guantanamo (*Elgizouli*, paras. 41–42, 48, 56). For UK officials, Guantanamo was unacceptable, as the United Kingdom had long objected to the holding of detainees there on legal and moral grounds (Murray 2010). In this case, another consideration was the objection to Guantanamo from the families of Elsheikh and Kotey's victims. The families wished to see the perpetrators tried—and justice secured—in a civilian court (New York Times 2018). The idea of a military trial in Guantanamo was thus an anathema to the UK government (*Elgizouli*, para. 58).

Another possibility that the government had to ponder was that the United States would forgo any legal treatment for Elsheikh and Kotey by simply releasing them from custody in Syria. Such a possibility seemed remote, but it was clearly one that the government wished to avoid, as the pair were considered a security risk (*Elgizouli*, para. 36).

The final option was to agree to a criminal trial in the United States that might result in the death penalty. This option relieved the UK government from the burden of trying Elsheikh and Kotey and ensured they would be punished for their crimes—at the steep price of violating the anti-death penalty norm.

Weighing these options, Home Secretary Sajid Javid recognized, in a letter to the Foreign Secretary on June 11, 2018, that the United Kingdom's attempts to obtain death-penalty assurances had failed, and that the time had come to accede to the US request for information without assurances, with full awareness that Elsheikh and Kotey might face execution as a direct result of the UK assistance: "In my view, this risk [of execution], and the related wider implications for the UK's death penalty policy, are outweighed by the risks associated with no prosecution being brought in this case if UK evidence is not shared." In his reply, Foreign Secretary Boris Johnson declared himself to be "a strong advocate for abolishing the death penalty and the UK's role in pursuing this globally." Yet he argued that the United Kingdom should provide assistance for the pair's prosecution in the United States "to provide a strong deterrent signal to others and ensure justice for victims' families" and given the United Kingdom's "international obligation to assist in bringing foreign terrorist fighters to justice" (*The Queen v. Secretary of State*, paras. 28, 30). Johnson recognized, however, that the United Kingdom's commitment to the abolition of the death penalty pushed in the other direction:

Set against all of these factors is the serious risk that providing the assistance would directly or

significantly contribute to the imposition of the death penalty ... Furthermore, because of our stance on the death penalty there is a wider reputational and political risk that would arise from executions in these cases following UK assistance. There is also a national security risk whereby there may be reprisals by extremists against British citizens at home and abroad, should the men be executed (*The Queen v. Secretary of State*, para. 32).

Weighing the competing considerations, Johnson concluded that “this is a unique and unprecedented case,” where national security interests justify assistance to a foreign criminal prosecution without death-penalty assurances. The Home Secretary then informed Attorney General Sessions on June 22, 2018 that the United Kingdom would not seek death-penalty assurances and would provide all materials for use only in a federal criminal prosecution (*The Queen v. Secretary of State*, paras. 32–33).

Overall, it seems that violating the death-penalty norm was *not* the United Kingdom’s government first choice, and a significant effort was made to avoid such violation—indicating that the norm had at least some impact. Prior to Elsheikh and Kotey’s capture, British officials stuck to the longstanding practice of demanding death-penalty assurances. Only after realizing that an insistence on assurances would be futile and counterproductive did British officials agree to drop their demand for assurances. They recognized that doing so would violate the United Kingdom’s commitment against the death penalty but believed this was justified in the unique circumstances of this case and for lack of a better option.

We return to the third practice-based indicator—the government’s response to criticism—following the discussion of the discourse-based indicators.

### Discourse-Based Indicators: Government Discourse

#### *Public Justification of Norm Violation and Public-Private Concordance*

In July 2018, *The Telegraph* published the Home Secretary’s letter to US authorities dropping the United Kingdom’s demand for assurances (Riley-Smith 2018). This revelation prompted a parliamentary outcry, and Ben Wallace, the Minister for Security, assured members of Parliament that “our long-standing policy on the use of the death penalty has not changed. The UK has a long-standing policy of opposing the death penalty as a matter of principle regardless of nationality and we act compatibly with the European convention on human rights.”

Against this background, Wallace presented the decision not to require assurances in this case as “rare.” He further argued that the decision was, in fact, *consistent* with the government’s policy on the death penalty. The Overseas Security and Justice Assistance (OSJA) Guidance required, as a precondition to the provision of assistance, written assurances to avoid the death penalty, but it allowed assistance without assurances in exceptional circumstances.<sup>2</sup> Again and again, Wallace declared that the government had acted lawfully, constantly consulting lawyers and checking with existing guidance and policy. He concluded that the decision to provide evidence without assurances was in line with international law and the United Kingdom’s domestic obligations—striking the right balance between the need to keep the UK public safe and human rights (HC Deb, July 23, 2018, cc725–731).

Consistent with the internal deliberations, Wallace presented the decision as an imperfect compromise and the best of poor options:

This case has no easy solutions. ... [Elsheikh and Kotey] have a better chance of proper representation in [an American] court of law than if they were left in detention by non-state actors in a war zone in north Syria, sent to Guantanamo Bay—something that the Government oppose fully—or allowed to go back into the battlefield and wreak murder and death ... Those were the options on the table that we as Ministers, charged with keeping people safe and balancing our obligations, and implementing the Government’s policy as set out in the OSJA, have to weigh up. We felt that there were strong reasons not to seek death penalty assurances when sharing the evidence for a criminal trial in the United States (HC Deb, 11 October 2018 cc294-295).

Overall, Wallace characterized the decision as an exception to the anti-death penalty norm, justified by the unique circumstances of the case and consistent with existing policy. His rhetoric showed no sign of rejecting the norm or denying its applicability. This, we suggested above, indicates norm robustness. Wallace’s public justifications also meet our second discourse-based indicator: concordance between private deliberations and public rhetoric. Like in public, in private discussions the ministers recognized the applicability—and importance—of the anti-death penalty norm, but believed that it was outweighed by the need to bring Elsheikh and Kotey to justice. We find no evidence that in private deliberations the government dismissed the norm for which it expressed support in public.

2 Annex B, Stage 3, Paragraph 9.



### *Resistance to Norm Violation from within the Executive*

Dissenting voices within the executive branch provide another indicator of norm robustness. At the political level, there is no indication of dissent in this case: the decision to provide the evidence without assurances won the support of the ministers involved as well as the prime minister (HC Deb, 23 July 2018 c728). Within the bureaucracy, however, there were voices on both sides. Some within the Home Office argued that “proceeding with no assurances is appropriate in securing justice for the families” and that seeking no assurances offers “the best chance of achieving our aim of a prosecution (and protecting the US relationship).” In contrast, the UK Central Authority—the entity handling legal-assistance requests within the Home Office—argued that making an exception to the longstanding policy on death-penalty assurances carried significant risk: “it could undermine all future efforts to secure effective written death penalty assurances . . . It could leave HMG open to accusations of western hypocrisy and double standards which would undermine HMG’s Death Penalty Policy globally, including in the US” (*The Queen v. Secretary of State*, paras. 19–21).

The Foreign Office bureaucracy argued that the United Kingdom should seek death-penalty assurances. While the provision of evidence without assurances increased the likelihood of a successful US prosecution that would serve as a deterrent to others, the Foreign Office warned, “there are wider national security risks if the prosecution results in an execution as this could be used by radicalisers in the UK” (*The Queen v. Secretary of State*, para. 27).

The dissenting voices from within the bureaucracy provide evidence in favor of the robustness of the anti-death penalty norm. Indeed, the Home Secretary and Foreign Secretary overruled the views of bureaucrats seeking to uphold the norm. But the expression of these views in itself suggests that the norm did carry certain influence.

### **Discourse-Based Indicators: Third-Party Reactions**

#### *Parliament*

The government’s decision to provide evidence without assurances met heated criticism in parliament from across the political spectrum.

Labour MPs rebuked the Conservative government for its willingness “to abandon their long-standing, principled opposition to the death penalty in this case,” calling it “abhorrent and shameful.” They rejected the government’s claim that this did not reflect a change in the

United Kingdom’s stance on the global abolition of the death penalty: the government “cannot be a little bit in favour of the death penalty. Either we offer consistent opposition, or we do not.” While agreeing that “those who commit barbaric crimes should be locked away for the rest of their lives,” Labour critics argued that no exception to the rejection of the death penalty was allowed: “The point about a principled opposition to capital punishment is that it exists in all circumstances.” In fact, precisely because of the barbaric nature of the crimes, “we as a country have to show that we are better than them and what they did.” Facilitating the death penalty in this case, argued Labour MPs, would only make the United Kingdom hypocritical as it seeks to persuade China and Pakistan to suspend the death penalty (HC Deb, 23 July 2018 cc726–732; HC Deb, 11 October 2018 cc294–298).

Legislators from other parties expressed similar outrage. MP Joanna Cherry (Scottish National Party) argued that the government’s death penalty strategy required opposition to the death penalty “in all circumstances.” According to MP Ed Davey (Liberal Democrats), the decision to assist US authorities without assurances “shocked people on both sides of this House.” Importantly, some *Conservative* MPs—members of the ruling party—expressed their concerns about the government’s decision. MP Andrew Mitchell reminded the government that “on human rights, we cannot distinguish between good and bad people. . . Human rights are indivisible and belong to everybody.” MP Dominic Grieve argued that this “is a major departure from normal policy. . . this issue will continue to haunt the Government” (HC Deb, July 23, 2018, cc728,730; October 11, 2018, c295; December 3, 2018, c598).

However, some Conservatives expressed *support* for the government’s decision to provide the evidence. MP Andrew Percy argued that Elsheikh and Kotey “are not United Kingdom citizens, and they are owed nothing by this Government.” Lord Rothaban suggested that “[a]ny obstruction put in the way of the prosecution of these murdering terrorists by the British Government would not be understood.” MP Desmond Swayne indicated that “most of our constituents . . . take the view that these people had it coming, didn’t they?” (HC Deb, July 23, 2018, cc731,734; October 11, 2018, c293; HL Deb, July 24, 2018, c1614). These expressions of support aside, the government’s violation of the anti-death penalty norm did win broad parliamentary condemnation, including from within the Conservative party. This serves as a strong indicator of the norm’s robustness.

### Courts

The debate over the death-penalty assurances quickly reached the courts, as Elsheikh's mother challenged the Home Secretary's decision to provide the evidence to US authorities before the High Court of Justice. She argued that the decision was inconsistent with the government's policy of opposing the death penalty in all circumstances, with the ECHR, and with the 2018 Data Protection Act.

The High Court rejected all grounds of the challenge to the Home Secretary's decision (*The Queen v. Secretary of State*, para. 218). On appeal, however, the UK Supreme Court reversed the judgment. While a majority of justices refused to recognize a common-law principle prohibiting the provision of legal assistance that might facilitate the death penalty, the justices unanimously held that the decision to provide the evidence violated the Data Protection Act. The Act establishes several conditions for the transfer of personal data to a third country, including a requirement of appropriate safeguards or a requirement of special circumstances to justify the transfer. The justices found that the provision of evidence to the United States did not meet either of these requirements. According to Lord Carnwath, "[i]t is apparent that the decision was based on political expediency, rather than strict necessity under the statutory criteria." (*Elgizouli*, paras. 227, 233).

The fact that the Supreme Court unanimously found the government's decision unlawful indicates the robustness of the anti-death penalty norm. The Court emphasized the United Kingdom's commitment to the abolition of the death penalty—a punishment which it deemed "immoral and unacceptable" (*Elgizouli*, para. 2)—and enforced that commitment by prohibiting the government from sharing the evidence with US authorities. At the same time, the limited grounds of the Supreme Court's decision, and the fact that the High Court did find the government's decision legal, send a mixed signal regarding the norm's strength.

### Public Opinion

The general public's response to this affair was muted. There was no major public protest against the government's decision to share information for the purpose of prosecution that might lead to the death penalty. Such indifference might reflect pro-death penalty sentiments in segments of the British public. Indeed, while the United Kingdom's domestic and international policy shows a commitment to the abolition of the death penalty, the public has been more ambivalent, with a large proportion of Britons continuing to support the death penalty. According to the British Social Attitudes survey, support for the death penalty among the British public stood at 74 percent in 1986. By 1998, support had fallen to 59 per-

cent, and in 2014 48 percent of people backed the death penalty for some crimes (*British Social Attitudes 2015*). This suggests that roughly half of Britons still believe that the death penalty may be a legitimate punishment under some circumstances. Against this background, one can understand occasional calls for reinstating the death penalty in the United Kingdom (*Kentish 2018*).

The absence of public protest against the provision of evidence to US authorities would be consistent with the popular support for the death penalty—indicating the weakness of the anti-death penalty norm. However, the absence of public protest may also reflect the unique circumstances of this case: it was the United States—not the United Kingdom—that threatened to impose the death penalty; the death penalty had not actually been imposed yet; Elsheikh and Kotey were no longer British citizens and their crimes were heinous. Given these circumstances, the British public's apparent indifference is perhaps to be expected and may not signal the weakness of the norm.

### Civil Society

Civil society actors harshly criticized the government's decision to provide evidence to US authorities without death-penalty assurances.

*Amnesty International UK (2018)* wanted the Home Secretary to unequivocally insist that Britain's longstanding position on the death penalty had not changed and to seek cast iron assurances that it would not be used. According to the International Commission of Jurists, "The Home Office cannot contend it is committed to the abolition of the death penalty as a matter of principle but suggest that in particularly unappealing cases this principle can be set aside" (*Potts 2018*). Religious leaders raised similar criticism. The President and Vice-President of the Methodist Conference stated that "even in the most difficult of cases, our nation's commitment to human rights and dignity—including opposition to the death penalty—should remain steadfast." John Inge, Bishop of Worcester, similarly declared that "If the death penalty is wrong, which I believe it is, then it is wrong full stop. . . . There should be no exceptions" (*Davies 2018*).

The strong and swift denunciation of the government's decision—from both human rights groups and religious leaders—provides evidence in favor of norm robustness.

### Government's Response to Domestic Criticism and Adaptation

We conclude with a final practice-based indicator of norm robustness: the government's response to the domestic backlash against the norm violation.

Upon agreeing to drop the demand for assurances in June 2018, the United Kingdom supplied a large number of witness statements to US authorities (*The Queen v. Secretary of State*, paras. 34, 141). Yet the Home Office suspended the transfer of materials at the end of July, in the face of the domestic backlash and, in particular, once Elsheikh's mother challenged the provision of evidence before the High Court (BBC 2018). During the legal process before the courts, the Home Office complied with a stay on the provision of further evidence. This raised the pressure on the United States, which had been holding Elsheikh and Kotey in Iraq since October 2019 and was desperate to resolve the limbo of their prosecution (Savage 2020a). Realizing, following the Supreme Court's decision, that there would be no evidence without assurances, the US Attorney General assured the Home Secretary in a letter on August 18, 2020, that "if the United Kingdom grants our mutual legal assistance request, the United States will not seek the death penalty in any prosecutions it might bring against Alexandra Kotey. . . or Shafee Elsheikh, and if imposed, the death penalty will not be carried out" (*The Queen (Elgizouli) v. Secretary of State for the Home Department* [2020] EWHC 2516 (Admin), para. 15).

On August 24, after receiving the long-sought assurances, the Home Secretary decided to transfer the requested materials to the United States and the transfer took place the following month, after the UK Supreme Court rejected another legal challenge filed by Elsheikh's mother (Savage 2020b). Possessing the necessary evidence, the United States brought Elsheikh and Kotey into the country on October 7 to face charges before a US federal court in Virginia (Goldman and Savage 2020). In April 2022, Kotey received a life sentence after pleading guilty to all counts. Elsheikh, convicted by jury, was sentenced to life in prison four months later (Lybrand 2022).

The fact that the UK government bowed to the public and legal pressure, suspended the transfer of evidence, and resumed it only following the receipt of assurances serves as another indicator of norm robustness. Rather than dismiss the critics or defy the court, the government ultimately complied with the anti-death penalty norm, as critics demanded. This culmination of the case reinforces the other indicators of norm robustness we have examined. The overall picture is one of a government uneasy about its decision to violate a core norm that ultimately reversed course under pressure from norm "guardians": parliament, civil society, and the courts. This means that overall, and despite some indications of weakness, the anti-death penalty norm enjoys robustness in the United Kingdom.

## French Foreign Fighters and the Iraqi Death Penalty

France became involved in the imposition of the death penalty in 2019 when French foreign fighters were transferred from northeast Syria to face trial in Iraq. Eleven of those were sentenced to hang by an Iraqi court for having joined ISIS and committing acts of terrorism. Their trials reportedly lasted 2 hours each (Rubin 2019a; CNCDDH 2020). Although the death sentences have not been carried out as of this writing, their imposition—with French involvement—raises doubts in the robustness of the anti-death penalty norm and exposes its limits.

### Practice-Based Indicators *France's Role in Norm Violation*

As with Britain, the current case did not involve the imposition of the death penalty by French authorities. Nonetheless, France played a key role in the death sentencing by Iraq. The exact nature of this role remains shrouded in secrecy, as France took great care to deny responsibility and avoid publicly discussing that role. But according to some accounts, the transfer of the French foreign fighters to Iraq was approved and partially orchestrated by French authorities (Fache 2019). The UN Special Rapporteur on extrajudicial, summary or arbitrary executions was "particularly disturbed by allegations that France may have had a role in this transfer, given the risk involved of torture and unfair trials and that they would likely face the death penalty" (UN 2019). It seems that, at the very least, France worked to secure the approval of the Kurdish militias and/or of the Iraqi authorities to bring its nationals to Iraq. Foreign Minister Jean-Yves Le Drian led negotiations on behalf of the French government, traveling to Baghdad to convince the Iraqis who were initially reluctant to try jihadists who had not committed crimes on Iraqi territory (L'Express with AFP 2019a). This suggests that the French government played a role in the chain of events leading to the imposition of the death penalty—pushing for and facilitating the trials—attesting to the norm's weakness.

### *Pursuit of Alternatives*

The French government did examine several alternative options for trying the foreign fighters, but none of them received as much attention and support as the Iraqi trials.

Repatriation of the foreign fighters was considered in early 2019 (Mustière 2019), but in March 2020 President Macron declared that repatriation would only take place on a case-by-case basis—apparently in response to the pressure of public opinion (L'Obs with AFP 2019; Le Figaro with AFP 2019). France had been deeply

traumatized by the attacks carried out by ISIS or in its name, and a return of ISIS affiliates was perceived by many as a threat to national security (Goulet 2017).

As the Iraqi trials were under way, in late 2019, the French government considered yet another option: a UN-brokered international solution. The motivation, however, was extraneous to the anti-death penalty norm: following a series of violent demonstrations that caused the resignation of Iraqi Prime Minister Adel Abdel Mahdi, the French government worried about the feasibility of the Iraqi trials (L'Express with AFP 2019b). The government ultimately secured the approval of Adel Abdel Mahdi's successor and continued to support the trials of the French jihadists in Iraq. The pursuit of the UN alternative was short-lived and had little to do with the specter of norm violation.

Overall, the government failed to seriously look for alternative judicial venues that did not practice the death penalty. This is a significant indicator of the weakness of the death-penalty prohibition.

### Discourse-Based Indicators: Government Discourse

The discourse-based indicators reinforce the impression of norm weakness, as the French government largely failed to acknowledge its violation of the anti-death penalty norm. The government did not willingly raise any concerns about the death penalty, and only addressed it when prompted to do so. In such context, there could be no explanation of why the situation called for an exception to the norm. This contrasts with the United Kingdom, where the discourse, even at the highest level of government, expressly acknowledged the tensions between the government's decision and the norm—and attempted to resolve them.

### Public Justification of Norm Violation

The government's support for the Iraqi trials rested on two main arguments.

First, according to the government, the foreign fighters had to be prosecuted in the place where they committed their crimes (Le Figaro 2020). This was a dubious argument, since the jihadists tried in Iraq had, for the most part, committed their crimes in Syria. Second, the French government viewed the trials as an expression of Iraqi sovereignty. Laurent Nuñez, the junior interior minister, argued that Iraq "is a sovereign state that dispenses justice. We have no reason to oppose having these individuals judged there" (Rubin 2019b). Since the trials of the French nationals in Iraq were deemed fair,

any public defense of norm violation was unnecessary (Le Monde 2019).

In the same breath as it expressed support for Iraqi sovereignty, the French government condemned in the strongest terms the imposition of the death penalty anywhere, including in Iraq. This, condemnation, however, was never linked to the trials of the French foreign fighters.<sup>3</sup> Indeed, the government paradoxically viewed the anti-death penalty norm as an issue distinct from the Iraqi trials, and never acknowledged that France might, in fact, be violating that norm by enabling the prosecution of its nationals in an Iraqi court. Whereas the UK government weighed the pros and cons of violating the anti-death penalty norm, the French government denied that its policy stood in tension with the norm. Furthermore, the government presented its policy as a *fait accompli* to the French public, without explaining why this was the appropriate solution or acknowledging the legal and ethical dilemmas involved.

### Resistance to Norm Violation from within the Executive

The executive branch largely spoke with a uniform voice about the Iraqi trials. Resistance to norm violation was mainly expressed by a governmental body known as CNCDH (National Consultative Commission for Human Rights)—opposing trials that it viewed as unfair, short, and potentially leading to the imposition of the death penalty in violation of French values and international commitments (CNCDH 2020). Overall, there is little sign of a significant, honest debate within the executive branch over the compatibility of the trials with a commitment to the anti-death penalty norm. We must qualify that assessment, however, since it is possible that a debate took place behind closed doors with no trace in the public record.

### Discourse-Based Indicators: Third-Party Reactions Parliament and the Courts

In contrast to the UK parliament, where the government's violation of the anti-death penalty norm came under heavy criticism, the French parliament remained silent on the issue. Though the fate of foreign terrorist fighters was addressed on multiple occasions (Menucci 2015; Vallini 2017), the sentencing to death of French citizens

3 See an interview with Foreign Minister Le Drian (May 28, 2019) <https://twitter.com/franceinter/status/1133270890362429441?s=20>, last accessed November 24, 2022.

in Iraq never came up for discussion. Monitoring government policies to ensure consistency with human rights is an important task of the legislature; the French parliament's failure to address this issue indicates the weakness of the anti-death penalty norm. This failure is understandable as parliament looked at the foreign fighters through a security prism. Viewed as a danger to national security, foreign fighters raised little sympathy when sentenced to death (Bilde 2019).

In another contrast with the United Kingdom, the French government's involvement in the imposition of the death penalty was not directly challenged before French courts, since the courts declared the issue of foreign fighters nonjusticiable.<sup>4</sup>

### *Public Opinion*

The French public seemed to approve of the Iraqi trials. In a February 2019 poll, 82 percent of respondents supported the decision to try French jihadists in Iraq, and 89 percent expressed concern about their potential repatriation to France (Odoxa 2019). The support for the Iraqi trials reflects not only a negative attitude toward the foreign fighters, but also a rising support for the death penalty, possibly a result of the numerous terror attacks on French soil since 2010. A poll conducted in 2020 revealed that 55 percent of the French public would support re-establishing the death penalty.<sup>5</sup>

### *Civil Society*

Several civil society actors criticized the French government's involvement in the death-penalty imposition. The main voices were those of NGOs devoted to the fight against the death penalty as well as families calling for the repatriation of their relatives from Syria (Parmentier 2018; ACAT 2019). Other NGOs, such as Human Rights Watch, condemned France for "outsourcing management of their terrorism suspects to abusive justice systems" (Human Rights Watch 2019). An NGO representing victims of terrorism strongly argued that the imposition of the death penalty can never be justified (France Info 2019). A group of 44 French lawyers signed a letter insisting that no exception could be made to the Constitution's prohibition on the death penalty. The letter recalled

France's fierce opposition to the death penalty when it was imposed against French nationals in Indonesia or Mexico, and criticized the uneven application of the law.<sup>6</sup>

While civil society actors in France did condemn their government's responsibility for the imposition of the death penalty, the response was limited to a select group with either a direct interest in criminal justice or a direct stake in the fate of the foreign fighters. In the United Kingdom, religious leaders joined the government's critics, but in France there was little criticism from public figures. While this indicator does not suggest the norm's weakness in France—there *was* civil-society condemnation—the limited scope of that condemnation signals a certain shakiness of the norm.

### *Government's Response to Domestic Criticism and Adaptation*

The French government did little to counter the muted criticism. Its main response came in the form of a commitment to "do everything to turn their death sentences into life imprisonment" and exercise "diplomatic pressure on Iraq to revoke the death sentences." In the wake of the sentencing of three French nationals to the death penalty in Iraq in May 2019, the government reiterated its objection to the death penalty and claimed that it "acted vis-à-vis Iraqi authorities to reaffirm this position" (France 24 2019; Ministry of Europe and Foreign Affairs 2019). Yet, in the end, France received no formal assurances that the sentences would be commuted. In fact, it made little public effort to press for such assurances, given the weak opposition to the trials and the public's objection to repatriation (Le Monde with AFP 2019). The government simply kept denying that the Iraqi trials violated France's commitment to the death-penalty ban (Sallon 2019).

### **British–French Comparison**

The British and French cases demonstrate the tension between the handling of terrorists and the anti-death penalty norm, yet the conflict is more acute in France. Whereas the British case involved information sharing with a fellow democracy with a reasonably strong rule of law, France enabled the trial of its nationals in a jurisdiction known for lacking due process (United Nations Assistance Mission for Iraq 2020). If anything, one might

4 Tribunal Administratif de Paris, Ordonnance des Référéés N° 1,906,077/9 (2019). <https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2019/04/1906077.pdf>, last accessed November 24, 2022.

5 See <https://www.ipsos.com/fr-fr/fractures-francaises-face-aux-crisis-qui-frappent-le-pays-un-besoin-de-protection-plus-fort-que>, last accessed November 24, 2022.

6 See [https://www.francetvinfo.fr/monde/proche-orient/francais-condamnes-a-mort-en-irak/tribune-ce-serait-un-immense-deshonneur-pour-notre-pays-l-appel-de-44-avocats-contre-les-condamnations-a-mort-de-neuf-francais-en-irak\\_3469333.html](https://www.francetvinfo.fr/monde/proche-orient/francais-condamnes-a-mort-en-irak/tribune-ce-serait-un-immense-deshonneur-pour-notre-pays-l-appel-de-44-avocats-contre-les-condamnations-a-mort-de-neuf-francais-en-irak_3469333.html), last accessed November 24, 2022).



have expected France to experience a stronger domestic backlash and to make greater effort to avoid the norm violation. Yet, our analysis shows the opposite.

The two countries diverged on a host of robustness indicators, including the three we flagged as the most important. In the United Kingdom, the prospect of a US-imposed death penalty triggered a government attempt at resolving a recognizable conflict with the anti-death penalty norm. The government considered alternatives and, although it eventually provided the requested information, this was after some hesitation and a weighing of all factors, including the norm itself. The government also publicly recognized its policy's inconsistency with the norm and came under significant parliamentary criticism. In France, in contrast, the government's refusal to acknowledge the norm violation, the scant attention devoted to alternatives, and the lack of a focused parliamentary debate all demonstrate what the weakening of a norm looks like.

Obviously, the final outcome of the British case also affirms the anti-death penalty norm, as the United States ultimately received the evidence only after providing the assurances. But the outcome aside, the entire handling of this case by the UK government and in the public arena shows greater interest in and a heavier weight of the anti-death penalty norm, compared to France, where the norm was left out of the debate over the fate of the returning foreign fighters. While difficult to pinpoint with precision, we propose that a norm decay is indicated by the lack of a meaningful public debate and the absence of domestic pushback against the government's norm violation. As long as some domestic actors guard the norm, even if they are unsuccessful, the norm shows signs of viability. But when the violation flies under the radar and meets apathy—when parliament, courts, civil society, and the public show little interest in the norm and fail to challenge its violation—the norm has eroded (Rojas 2022).

The British–French variation can be partly attributed to differences in political institutions. Since the advent of the Fifth Republic, the French system has been characterized by a strong executive branch that dominates matters of foreign policy. Disagreements may arise between the prime minister and the president, but rarely between the Executive and others branches of government. When the president and the prime minister are aligned and backed by the French bureaucracy, challenges from parliament, courts, or public opinion are unlikely (Risse-Kappen 1991).

The non-involvement of the French courts reflects a more general trend to avoid judicial review of “highly technical or politically sensitive cases” (Jordão and Rose-Ackerman 2014). In fact, the Conseil d'Etat, the highest

administrative Court in France and the guardian of norms, rejected a request from French nationals seeking to repatriate family members from Syria on the ground that it fell within the competence of the executive branch and was therefore nonjusticiable.<sup>7</sup> Attempts to challenge the Iraqi trials through French courts would probably have suffered a similar fate. The courts' deference on major policy decisions, the strength of the Executive and its supporting bureaucracy, and the limited influence of the public over foreign policy partly account for the weakness of the norm in France, compared to the United Kingdom. But the little interest that the matter aroused in France indicates, in our view, a problem deeper than restricted opportunities for political contestation. It signals limited concern for the norm itself, as long as France is not directly responsible for its violation.

### Generalizing the Argument

The British–French divide in the robustness of human rights norms extends beyond the death penalty. Consider the export of arms to countries that violate human rights or international humanitarian law. Both Britain and France have sold arms to repressive governments (Erickson 2013). Both countries have supplied arms to Saudi Arabia, implicated in the commission of war crimes in Yemen (ATT Monitor 2016). Yet, similar to the death-penalty case, the domestic contestation over arms exports is greater in Britain than in France. Several British NGOs have engaged in advocacy and protest against harmful arms transfers; the parliamentary Committees on Arms Export Controls oversee the arms trade; and, in 2019, the Court of Appeals declared the illegality of arms exports to Saudi Arabia. In France, in contrast, decisions on arms exports are made behind closed doors, with limited input from NGOs, parliament, or courts (Sabbagh and McKernan 2019; Rosa Luxemburg Stiftung 2021). This means that in terms of third-party responses, human rights norms in arms exports seem somewhat healthier in the United Kingdom than in France. Furthermore, the French failure to acknowledge norm violation is echoed in the case of arms exports. According to the French narrative, “France conducts strict, transparent and responsible control of its exports of war materials”—a narrative that completely disregards the country's record of arms sales to human rights violators (Soubrier 2022).

7 Conseil d'Etat, Ordonnance N° 429,668 (2019). <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000038451682>, last accessed November 24, 2022.

## Conclusion

This article has demonstrated how tricky it is to evaluate norm robustness. Even norms that are formalized and long complied with might not, in effect, be robust. Both the United Kingdom and France are parties to international agreements that ban the death penalty; both countries have not executed anyone for decades. Our analysis reveals, however, that this robustness might prove illusory when governments face circumstances that, in their view, justify norm violation. This means that norm robustness is best measured in hard cases, such as those involving highly unpopular individuals. The cases considered here involved people who committed heinous crimes, were seen as having betrayed their country, and posed a continuing security threat. The negative sentiments toward the ISIS foreign fighters made it easier for the British and French governments to violate the anti-death penalty norm. The norm violation was also facilitated by the fact that the foreign fighters were not under direct British/French control, allowing the denial of direct responsibility for the death penalty. It is these violation-conducive circumstances that put an established norm to the test, and future research should seek out similar cases.

Our research also shows that a government's violation of an established norm is not necessarily a cause for despair and should not immediately prompt a prognosis of norm decay. The British case demonstrated that norms under duress may show signs of a healthy life: actors inside and outside the state apparatus protested the norm violation and pressured the government into changing course. This demonstrates that norms can achieve robustness when they enjoy domestic support, even as the government tends toward norm violation. This experience also underscores the importance of getting a full picture of the domestic arena in norm research: the attitudes of publics, members of parliament, courts, the bureaucracy, and NGOs can all affect norm robustness (Simmons and Jo 2019, 31–32). Different domestic constraints can yield very different government behavior, as the British–French comparison reveals.

The current case further illustrates the tension between counterterrorism and human rights (Efrat 2015) and the difficulty of democratic societies in striking the right balance—a difficulty also reflected in the use of torture against terrorism suspects and in the practice of targeted killings (McKeown 2009). Even established democracies may be tempted to violate fundamental norms under the security threat and moral outrage that terrorism raises. The violation is not always direct: democracies may bear responsibility for facilitating human rights violations by others. A prime example is the participation of many democracies in the US program

of rendition and secret detention in the post-9/11 period (Cordell 2017). Similarly, in the case of foreign fighters, Britain and France did not carry out executions themselves, but were willing to assist other countries that do. Future research may wish to focus not only on direct violation, but also on *complicity in violation* to get a fuller picture of the status of human rights norms and the process of norm decay. When such complicity is taken into account, the anti-death penalty norm seems shakier than one expects. Not only the likes of China and Iran violate the norm, but seemingly staunch supporters, such as Britain and France, are also willing to assist in its violation—particularly in the face of alternatives that they perceive as more costly. The anti-death penalty norm has clearly not died, but we have underestimated the challenges it faces.

Global research on norm robustness might miss this nuance. In global studies of the anti-death penalty norm, Britain and France are coded as abolitionist countries (Neumayer 2008; McGann and Sandholtz 2012). We have demonstrated that the label “abolitionist” might hide a more complex dynamic, in which the norm is contested or violated. While global norm analysis has value, this study shows the merit of an in-depth, comparative exploration for obtaining a more nuanced assessment of the status of norms and a deeper understanding of the process leading to norm decay.

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