



# Politics of International Advocacy Against the Death Penalty: Governments as Anti-Death Penalty Crusaders

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## Abstract

Two-thirds of the countries worldwide have moved away from the death penalty in law or in practice, with global and regional organisations as well as individual governments working towards universal abolition. This article critically examines the narratives of these abolitionist governments that have abolished the death penalty in their country *and* have adopted the role of ‘moral crusaders’ (Becker 1963) in pursuit of global abolition. In 2018, the Australian Government, while being surrounded by retentionist states in Asia, joined the anti-death penalty enterprise along with the European Union, the United Kingdom and Norway. Using the concepts of ‘moral crusader’ (Becker 1963) and ‘performativity’ (Butler 1993), this article argues that advocacy must be acted on repeatedly for governments to be anti-death penalty advocates. Otherwise, these government efforts serve political ends in appearance but are simply a self-serving form of advocacy in practice.

**Keywords:** Death penalty; advocacy; performativity; moral crusader; Australia.

## Introduction

In *Outsiders*, Becker (1963: 163) noted that research on deviance primarily concerns itself with ‘people who break rules rather than with those who make and enforce them’. Much of the death penalty scholarship, at least in the English language literature, is abolitionist in that it accepts the norm of death penalty abolition, discusses the reasons for ‘deviance’ (death penalty retention) or accepts death penalty abolition from an inevitable empirical standpoint. Indeed, to date, the death penalty scholarship has focused on the shrinking number of retentionist states (e.g., Behrmann and Yorke 2013; Hodgkinson and Schabas 2004; Hood and Hoyle 2015; Schabas 2002, 2021; Steiker and Steiker 2019); barriers for death penalty abolition, such as deterrence, public opinion, politics, religion and culture (e.g., Garland 2010; Zimring 2003; Hood 2015; Johnson and Zimring 2009; Nagin, Peppers and National Research Council 2012; Sarat 1999); and alternatives to the death penalty (e.g., Hodgkinson 2016).

The international landscape of retentionists versus abolitionists has flipped the debate on the death penalty: what used to be an ‘unproblematic institution universally embraced is fast becoming a violation of human rights’ (Garland 2011: 61). In 1948, when the Universal Declaration of Human Rights (UHDR) was adopted, declaring that ‘everyone has the right to life’, the vast majority of United Nations (UN) member states were retentionist (Schabas 1998: 797). The death penalty as a form of criminal punishment was also considered legitimate and was imposed at the Nuremberg and Tokyo postwar tribunals (Schabas 1998: 797). Today, two-thirds of countries worldwide have abolished the death penalty in law or in practice (Amnesty International 2021). The latest governments that have joined the abolitionist camp are Malawi, which abolished the death penalty through



judicial leadership in 2021 (Novak 2021) and Papua New Guinea, which achieved abolition through political leadership in January 2022 (Pascoe and Novak 2022).

While scholars and human rights organisations may have been concerned primarily with how to nudge retentionist governments towards adhering to the norm of death penalty abolition, rules do not emerge from nowhere—rather, they are ‘products of someone’s initiative’ (Becker 1963: 146). In this sense, the UN is undoubtedly a ‘moral entrepreneur’ (Becker 1963), setting the norm against the death penalty. The UDHR, adopted by the UN General Assembly in 1948, resulted from the shared experience of World War II and marked the announcement of a set of universally accepted human rights. While the UDHR does not specifically mention the death penalty, it guarantees the right to life (Article 3). In 1971, the resolution of the General Assembly affirmed that:

In order fully to guarantee the rights to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries’ (UN General Assembly Resolution 1971: 94).

The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, refers to the death penalty as an exception to the right to life but clearly advocates the abolition of the death penalty as a human rights objective and provides safeguards and restrictions on its implementation (Article 6). The ICCPR has been ratified by 117 states as of April 2022. The subsequent adoption of the Second Optional Protocol to the ICCPR in 1989 strengthened the UN’s stance against the death penalty in proclaiming the abolition of the death penalty in times of peace and war. The standards set forth by the UN have been reinforced and strengthened through its various monitoring mechanisms.

If the UN functions as a moral entrepreneur promoting the anti–death penalty enterprise, and retentionist governments serve as the deviant rule-breakers, there is a third set of players: ‘the moral crusaders’ (Becker: 1963). Moral crusaders are actors that internalise the norm created by the moral entrepreneur and encourage rule-breakers to conform to the rule—in this case, to move away from the death penalty.<sup>1</sup> For example, the European Union (EU)—a political and economic union of 27 countries—is probably the best known moral crusader for global abolition of the death penalty (Behrmann and York 2013). The abolition of the death penalty is a major objective of the EU’s external human rights policy and a precondition for EU membership. The EU has used its diplomatic and political weight to influence countries that have not yet abolished the death penalty to ‘join the ranks of the abolitionists’ (European Parliament 2019: para 1). It has employed various strategies to spread the abolitionist agenda, including the adoption of guidelines, issuance of resolutions and use of conditionalities (e.g., Behrmann and York 2013; Fawn 2013; Lerch and Schweltnus 2006; Schmidt 2007). In addition to the EU, some abolitionist governments have also stepped up to assume the role of moral crusader in recent years. The United Kingdom (UK), Norway and, more recently, Australia have separately declared their mission to end the death penalty worldwide (UK Human Rights and Democracy Department 2011; Norwegian Government 2012; Australian Government 2018).

This article concerns the emergence of governments as anti–death penalty crusaders. Instead of adding to the mainstream literature on the ‘deviant’ rule-breakers that retain the death penalty, I reorient the discussion on death penalty research by offering a critical reflection on the role of moral crusaders and how they shape global advocacy against the death penalty. I use labelling theory and performativity theory in advancing my argument. In criminology, labelling theory helped broaden the areas researched in the study of deviance by highlighting the activities of others than the ‘deviant’ actor. Specifically, I use Becker’s (1963) concepts of ‘moral entrepreneurs’ and ‘moral crusaders’ in positioning death penalty actors because this allows us to expand the focus from the rule-breakers (retentionist states) to the creators and enforcers of labels (anti–death penalty advocates). I then use the concept of performativity to qualify and critically examine the role of moral crusaders. I apply Butler’s notion of ‘performativity’ (1993)—originally used to conceptualise gender—to death penalty advocacy. According to Butler, performativity is the idea that gender is produced through time and negotiation; by repeating certain gestures and phrases and ways of being, it congeals into identity. I argue that announcing itself as an anti–death penalty crusader does not automatically result in a government taking a principled stance on the issue.

This article makes three observations regarding the benefits and costs of the moral crusader position. First, singling out opposition to the death penalty as *the* priority within a country’s external human rights policy may, by omission, provide cover for parallel forms of human rights abuse, such as extrajudicial execution, which are equally problematic if not normatively worse. Second, moral crusaders gain reputational benefits from their principled position, including laundering their own history with the practice of the death penalty (e.g., Anderson 2015) and being able to align themselves with other governments and organisations that stand against the death penalty. Third, a principled position against the death penalty may be difficult to uphold in practice and may cause problems for international relations, which require states to work together for shared interests

despite differences. The failure of moral crusaders to maintain their principled stance raises concern about hypocrisy and may, ultimately, result in the delegitimisation of the anti–death penalty movement.

### Abolitionist Governments as ‘Moral Crusaders’

This section analyses the Australian Government’s pledge to become an advocate for global abolition together with the policies of the EU, the UK and Norway. Adapting Becker’s (1963) framework, a moral crusader goes beyond abolishing the death penalty in its own country:

The moral crusader is a meddling busybody, interested in forcing his own morals on others. But this is a one-sided view. Many moral crusaders have strong humanitarian overtones. The crusader is not only interested in seeing to it that other people do what he thinks right. (Becker 1963: 148)

Before Australia announced its new policy on the death penalty, the EU, the UK and Norway had already adopted the role of anti–death penalty crusaders. The following quotes summarise their respective commitments to their advocacy:

The European Union is strongly opposed to the death penalty in all circumstances, and fighting it is a foremost priority of its external human rights policy ... The Union uses its diplomatic and political weight to *encourage these countries to join the abolitionist ranks*. (European Parliament 2019: para. 1; emphasis added)

Promoting human rights and democracy is a priority for the UK. It is the longstanding policy of the UK to oppose the death penalty in all circumstances as a matter of principle ... This strategy sets out the UK’s policy on the death penalty, and offers guidance to FCO [Foreign and Commonwealth Office] overseas missions on *how they can take forward our objectives*. (UK Human Rights and Democracy Department 2011: 3; emphasis added)

The fight against the death penalty is one of the priority areas of Norway’s human rights policy ... Norway will therefore *encourage more countries to abolish the death penalty* ... Abolition of the *death penalty is a priority issue that should be raised whenever appropriate* at political-level meetings and during official visits, in political dialogues, human rights dialogues and in consultations on human rights with other countries. (Norwegian Government 2012: 6–7; emphases added)

To fully appreciate the role that these governments and the EU have assumed, a distinction must be drawn between two types of abolitionist governments. The first type is governments that have abolished the death penalty in their jurisdictions and comply with obligations arising from ratifying human rights treaties against the death penalty. The second type is governments (and the EU) that have done away with the death penalty *and* have adopted a role—beyond their treaty obligations—to advocate global abolition. These governments have not only internalised the norm of death penalty abolition but also chosen to externalise its adopted norm to others. In other words, when governments move away from being *regulated* by domestic law and treaty obligations and adopt the role of a *regulator*, they become a moral crusader in enforcing its anti–death penalty advocacy.

Australia transitioned from being the first type of abolitionist to an anti–death penalty crusader in 2018. 2022 marks the centenary since Queensland became the first state to achieve *de jure* abolition (Finnane, this volume). The abolition of the death penalty at the federal level occurred in 1973, followed by New South Wales in 1985—the last state to achieve *de jure* abolition in Australia (Strange, this volume). In 2010, the introduction of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (Commonwealth)* further strengthened Australia’s commitment against the death penalty by preventing its reintroduction in any state or territory. Under international law, Australia has ratified the ICCPR and the Second Optional Protocol to the ICCPR, which oblige the government to do more than ensuring no one within its jurisdiction will be executed. The government must not expose individuals to a ‘real risk’ of execution in other countries (*Judge v Canada*: para. 10.4; see also UN Human Rights Committee 2014a). Therefore, the obligation of an abolitionist government extends to persons outside Australia’s territory and who are not subject to its jurisdiction.

While Australia has progressively consolidated its stance against the death penalty through domestic law and ratification of treaties, the turning point for Australia’s position against the death penalty came in 2015. The executions of two Australian nationals—Andrew Chan and Myuran Sukumaran—in Indonesia awakened public consciousness to the reality that being subjected to the death penalty is a real possibility as long as the death penalty remains a lawful punishment somewhere in the world (ABC News 2015; McMahan, this volume). It also challenged the Australian Government to re-evaluate its responsibility as an abolitionist state, leading to its declaration to lead the advocacy to end the death penalty worldwide (Australian Government 2018: 2).

In 2018, Australia expanded its commitment to death penalty abolition beyond its obligations outlined above by outwardly promoting abolition worldwide (Australian Government 2018). Australia's Strategy for Abolition of the Death Penalty ('the Strategy'), published by the Department of Foreign Affairs and Trade, formalised its unequivocal stance for universal abolition:

Australia opposes the death penalty in all circumstances for all people. We support the universal abolition of the death penalty and are *committed to pursuing this goal through all the avenues available to us.* (Australian Government 2018: i; emphasis added)

The Strategy clearly goes beyond Australia's legal obligations by pledging to take an active role in nudging retentionist countries to move away from the death penalty. Recognising that the path for abolition is gradual, the Strategy adopts a 'staged, sequences approach' to 'increase the number of abolitionist countries' (Australian Government 2018: 3). It boldly states that 'Australia will be a *leader* in efforts to end use of the death penalty worldwide' (Australian Government 2018: 2; emphasis added). This Strategy firmly places Australia among the other moral crusaders in its public campaign against the death penalty.

When the UK government announced its strategy paper, Malkani (2013) praised the decision of the UK government to publicly adopt the advocate role in its global fight against the death penalty. He argued that:

If a State publicly and actively promotes the abolition of the death penalty in other countries, then that State must be politically and morally obliged, if not legally obliged, to ensure that it is not complicit in the administration of the death penalty in those countries. (Malkani 2013: 525)

Malkani viewed it as a positive step for an abolitionist government to advocate global abolition beyond its legal obligations. He also assumed that taking a principled stance publicly leads to the government acting on its promise. In the following sections, I qualify the idea that identifying oneself as an anti-death penalty crusader advances death penalty abolition beyond preaching to the already converted. I critically examine the assumption that the actions of an anti-death penalty crusader are, by virtue of its official position, principally against the death penalty 'in all circumstances for all people' (Australian Government 2018: i).

### **Singling Out the Death Penalty**

Of the various human rights issues on which these governments and the EU could have focused, they selected the death penalty. For example, the EU has explicitly described its opposition to the death penalty as a 'foremost priority' within its external human rights policy (European Parliament 2019: para.1). The Norwegian Government has also described its fight against the death penalty as 'one of the priority areas' of its human rights policy (Norwegian Government 2012: 6). One unintended consequence of singling out the death penalty as *the* human rights issue is that boundaries are drawn between death penalty and other equally important human rights violations—from extrajudicial killings, torture, to slavery (e.g., human trafficking)—which consequently fall outside their priority.

As noted, the number of countries that retain the death penalty in law and in practice is shrinking. Among retentionist countries, some retain the death penalty under law but have not carried out executions in over 10 or more years. Only approximately 10 countries remain that have persistently executed people over the last five years (Amnesty International 2021).<sup>2</sup> However, some countries have abolished the death penalty but are engaged in other forms of state-sanctioned killing. The clearest example is the extrajudicial killings carried out in the name of 'war on drugs' in the Philippines (Human Rights Watch 2017). The Philippines abolished the death penalty in 2006, but the government has continued to execute individuals outside its criminal justice process. By singling out the death penalty as a priority, such a form of state-sanctioned killing does not technically come onto the radar of the anti-death penalty crusaders.

Further, there are other less obvious examples of state-sanctioned killing. The lens of critical legal pluralism<sup>3</sup> is useful in identifying a functional equivalence among different types of state-sanctioned killing; the normative implication is that they must *all* be at the forefront of reform efforts. In 11 countries, the death penalty is a theoretical possibility for same-sex sexual intimacy. Applying a legal pluralistic framework, state-sanctioned killing of same-sex attracted people occurs in at least 23 countries (Sato and Alexander 2021; Alexander, Sato and Zanghellini 2022). State-sanctioned killings include extrajudicial and quasi-judicial killings, where state actors carry out the killing; instances where the state retrospectively authorises, through bias or lawful excuses, homicide of same-sex attracted people; and cases where the state permits or endorses forms of so-called 'conversion therapy' that lead to death. A narrow focus on the death penalty as the only genuine form of state killing is analytically unwarranted and strategically dubious in terms of law reform advocacy upholding the right to life. The commitment by governments and the EU that identifies the death penalty as a key human rights issue worthy of attention at the same time creates a zone of less important issues outside its boundaries.

## Reputational Benefits of Anti-Death Penalty Advocacy

The anti-death penalty crusaders introduced above—namely the EU, the UK, Norway and Australia—are remarkably similar in their approach to advocacy. Commonalities exhibited by the enterprise is that its anti-death penalty stance is couched in the language of human rights. For example, the Australian Government stated that ‘the death penalty has no place in the modern world’ due to its commitment to ‘universal human rights’ (Australian Government 2018: 2). Zimring (2003: 89) rightly argued that as soon as the government internalises the human rights premise against the death penalty, ‘the debate begins and ends with the human rights ... all the traditional controversies about capital punishment lose their legitimacy when a preemptive human rights strike succeeds’. The commonly cited justifications for retaining the death penalty as appropriate punishment for heinous crimes—such as retributive justice, deterrence and public sentiment—get sidelined as irrelevant (Zimring 2003: 89). Indeed, the UN, the gatekeeper of human rights, has often disengaged itself from meaningfully rebutting the reasons provided by retentionist governments for not moving away from the death penalty by simply reiterating demands that these states accept the human rights premise (Sato 2014).

The declarations by anti-death penalty crusaders in using the human rights premise to outright reject death penalty retention can be understood in several ways. First, given that the language used in these declarations begins and ends with the rights-based arguments against the death penalty, the anti-death penalty crusaders may hope to rely on their ‘soft power’ (Nye 2005). This option would only be successful if retentionist governments wanted to align themselves with the anti-death penalty crusaders. Alternatively, the moral crusaders may rely on ‘hard power’ (Nye 2005) to change retentionist governments’ position on the death penalty. The success of this approach again would not depend on norm diffusion because hard power operates on threat or inducement. The EU has used hard power diplomacy extensively in promoting death penalty abolition. The most famous example is the EU membership conditionality, which includes death penalty abolition. This hard power policy has been a powerful tool for aspiring countries wishing to join the EU, although ‘it might not always succeed in making societies adequately integrate those norms’ (Peshkopia et al. 2018: 1356).

In past decades, the EU has also used other hard power approaches, such as trade policy instruments, to improve human rights standards (Borchert et al. 2021). In particular, the EU’s Generalised System of Preferences Plus (GSP+) offers suspension of tariff duties or even the full removal of tariffs on the condition that beneficiary countries comply with the system’s rigorous criteria (Jayasinghe 2015). The requirements include, among other things, the ratification and effective implementation of at least 27 international conventions related to human rights, labour rights and environmental protection (Portela 2019). In 2021, the European Parliament adopted a resolution calling for a review of Pakistan’s GSP+ status over the abuse of its blasphemy laws to which the death penalty applies (European Parliament 2021). In view of an alarming increase in blasphemy accusations, the 2021 resolution called on the Pakistan Government to ‘unequivocally condemn’ incitement to violence and discrimination against religious minorities in the country (European Parliament 2021).

A more cynical interpretation of these anti-death penalty declarations is to consider the possibility that the crusaders may not be so interested in being heard by retentionist governments that they *claim* to influence. These moral crusaders maintain reputational benefits by virtue of their self-declared principled stance. If the intended audience is not the retentionist governments, one must entertain the possibility that the real audience may well be other anti-death penalty crusaders and organisations such as the UN that represent the anti-death penalty enterprise. A public statement to join the anti-death penalty advocacy showcases camaraderie and morally aligns the crusader with the international community against the death penalty.

In the case of Australia, the performative process of declaring its principled position against the death penalty through the publication of the Strategy has brought tangible benefits to the government. Before its publication, the discussion of the death penalty involving the Australian Government invariably revolved around the role it played in the execution of Andrew Chan and Myuran Sukumaran.<sup>4</sup> The Joint Standing Committee was set up to review Australia’s role in anti-death penalty efforts (Joint Standing Committee on Foreign Affairs, Defence and Trade 2016), resulting in the launch of the Strategy in 2018. Therefore, the Strategy signifies a new start in attempting to establish Australia as a committed anti-death penalty advocate.

Further, Australia’s commitment to anti-death penalty advocacy helped secure a seat at the UN Human Rights Council. The global abolition of the death penalty was central to Australia’s campaign for Council membership (Maguire, McGaughey and Monaghan 2019). Choosing the death penalty over other human rights abuses helped divert attention away from Australia’s problems. Having achieved abolition in its jurisdiction, calling for the global abolition of the death penalty was not controversial—according to the government, it was a cause that had ‘broad bipartisan political support’ (Australian Government 2018: 4). Had Australia selected a topic such as asylum seekers and refugees as its priority human rights topic, the Strategy would have been less external-facing. Indeed, Australia has been criticised for its treatment of asylum seekers (Mendez 2015).

In sum, the pledge to subject itself to a standard beyond the legal obligations in opposing the death penalty has been advantageous for the Australian Government.

### **Performative Advocacy: Reciprocal Access Agreement Between Australia and Japan**

The previous section critically examined the position taken by anti–death penalty crusaders and explored the political context in which the Australian Strategy was born. The Strategy played a performative function in portraying Australia as a committed anti–death penalty advocate. However, reality is created through repetition, negotiations and by doing (Butler 1993). Therefore, while publishing statements against the death penalty is an act, these declarations must be repeatedly acted on for a government to *be* an anti–death penalty advocate. For example, the UK was the first government to assume an advocate role in its fight against the death penalty. Its strategy paper published in 2011 was intended to guide its efforts until 2015 (UK Human Rights and Democracy Department 2011). However, that government has not published an updated strategy beyond this point. Further, in 2018, the UK home secretary agreed to assist the United States (US) with the prosecution of two former British citizens charged with terrorism even after the US refused to provide an assurance that the information would not be directly nor indirectly used in a death penalty prosecution (Malkani 2018). The home secretary went as far as notifying the US attorney-general that the UK would not seek assurances that the death penalty would not be sought (Malkani 2018). In sum, the UK government’s way of doing anti–death penalty has not matched its principled commitment against the death penalty as promised.

Turning our attention to the actions of Australia, the government’s commitment to its Strategy has recently been tested in negotiations with the Japanese Government. The Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan (the Agreement) provides a legal framework for the Australian Defence Force and the Japanese Self-Defense Forces to operate in each other’s territories (Parliament of Australia 2022). Since negotiations began in 2014, a significant stumbling block has been Japan’s use of the death penalty and the Australian Government’s opposition to it (Sato and Abel 2020). Japan retains the death penalty for 19 crimes; 97 prisoners have been executed by hanging since 2000; and, as of March 2022, 108 individuals are on death row who have exhausted or abandoned their avenues of appeal (CrimeInfo 2022). The UN Human Rights Committee (2014b) has repeatedly raised concerns with the Japanese Government regarding its death penalty both in law and in practice—which violates international standards.<sup>5</sup>

While yet to enter into force,<sup>6</sup> the Agreement signed by the prime ministers of Australia and Japan in January 2022 falls short of a clear assurance that members of the Australia Defence Force will not face the death penalty in Japan (Eleos Justice, Capital Punishment Justice Project, CrimeInfo and ADPAN 2022). According to the Agreement, where a member of the Visiting Force or Civilian Component commits an offence within the Receiving State and punishable under the law of the Receiving State, the authorities of the Receiving State have criminal jurisdiction to deal with the matter (Article XXI(2)(b) of the Agreement). This leaves scope for a member of the Australian Defence Force or Civilian Component to be sentenced to death for being convicted of a capital crime under Japanese law.<sup>7</sup>

Australia may avoid its obligation to assist Japanese authorities in instances where there is a ‘sufficient likelihood’ of the members of the Australian Defence Force facing the death penalty (Department of Defence 2022: 8).<sup>8</sup> However, the withholding of assistance does not necessarily protect members of the Australia Defence Force. For example, where the accused is on Japanese territory and the Japanese authorities have sufficient evidence to convict the accused, the lack of assistance by the Australian Government is irrelevant. Further, the standard of ‘sufficient likelihood’ is inadequate because it leaves open the possibility that assistance may take place where the death penalty is a possible outcome of such assistance, and it is not feasible or realistic for the Australian Government to properly assess the level of likelihood of a death sentence being imposed in a foreign legal system. The memory of two Australian citizens, Andrew Chan and Myuran Sukumaran, executed in Indonesia in 2015—despite the Australian Government’s efforts to prevent it—continues to linger in the minds of all Australians.

The Australian Government is optimistic about both countries’ ‘close coordination and cooperation to resolve any issues that might arise’ (Department of Defence 2022: 4) and emphasises the shared beliefs of Australia and Japan, such as both countries placing ‘importance on ensuring the good order and discipline of their defence forces at all times’ (Department of Defence 2022: 4). The fact that the countries have opposing stances on the death penalty is underplayed: the Record of Discussion concerning Article XXI simply notes that whether to refuse assistance will be assessed on ‘a case-by-case basis’ (Department of Defence 2022: 8). It is entirely possible that, in some cases, members of the Australian Defence Force could be executed even if there was some kind of implicit understanding that this will not transpire. Such a ‘case-by-case’ approach is difficult to enforce in circumstances where governments change over time and the goodwill that ensued at the time of the Agreement has dissipated for some reason. Further, a reliance on implicit understandings directly undermines the Strategy because a consistent

approach by the Australian Government is essential if the Strategy is to be implemented meaningfully. There is a risk that if Australia is willing to enter into an agreement of this nature with Japan, albeit on the basis of so-called shared beliefs, other countries with even less congruity of values may seek to enter into similar agreements with Australia and will also insist that they will not provide anti-death penalty safeguards. In short, the Agreement, if entered into force, will set an uncomfortable precedent.<sup>9</sup>

Above all, for Australia to enter into an agreement with the full knowledge that the death penalty may be applied to its citizens would be a clear breach of its Strategy.<sup>10</sup> Therefore, it is extraordinary that the Department of Foreign Affairs and Trade—the very department responsible for drafting and upholding the Strategy—identified ‘no concerns’ with the Agreement when consulted by the Department of Defence (Department of Defence 2022: 7). The Strategy must be repeatedly reinforced and acted upon, whenever relevant, for it to be truly effective, rather than being a collection of platitudes. While appreciating that much of the negotiations between governments, including this Agreement with Japan, could not have been disclosed, what little is made public becomes key in reinforcing Australia’s principled stance against the death penalty to its own citizens, the retentionist governments and the international community.

## Conclusion

In 2018, the Australian Government became the latest to join the anti-death penalty enterprise along with the EU, the UK and Norway. The mission of the anti-death penalty crusaders is a public and a principled one that singles out the abolition of the death penalty as a key human rights priority, at the cost of demarcating less important human rights issues—such as other forms of state-sanctioned killing—in the eyes of these crusaders. The mission is also an external-facing one that encourages countries that retain the death penalty to do away with it. While noble at first blush, this article has offered a critical reflection on the significance and sincerity of the pledge to lead the global abolition of the death penalty, using the concept of the ‘moral crusader’ (Becker 1963), and the actions of the anti-death penalty crusaders in *doing* advocacy by applying the concept of ‘performativity’ (Butler 1993).

Thus far, the Australian Government’s decision to subject itself to a rigorous standard beyond its domestic law and treaty obligations in opposing the death penalty has produced reputational benefits for itself. The publication of the 2018 Strategy has allowed Australia to leave behind the tainted image of being associated with the execution of Australian nationals and birth a new identity as an anti-death penalty advocate. The new image has also helped the Australian Government secure membership of the UN Human Rights Council.

Regardless of the political context in which Australia’s Strategy was born, examining the ongoing negotiations concerning the Agreement between Australia and Japan, the Australian Government has not managed to maintain its principled position against the death penalty. However, it should be recognised that policy decisions are always met with pressures for compromise, and the costs of refusing to compromise can be real even when compromises are unwarranted. The Strategy does not exist in a vacuum, and the Australian Government must tread carefully and balance competing political, economic and security concerns. The quarrel over primary jurisdiction and extradition for serious crimes committed by US soldiers on Japanese soil has been a reality for Japanese citizens (e.g., Fisher 2014). The likelihood of Australian military personnel receiving the death penalty may seem a remote hypothetical to the Australian Government.<sup>11</sup> However, a principled stance by the Australian Government on the Agreement would have provided much-needed support to Japanese civil society—weak, small and often ignored by authorities—with a new angle to galvanise the call for death penalty abolition. Nevertheless, instead of damaging the key relationship with Japan, one may take the view that a compromise seen in the Agreement is far more effective in the long term in maintaining a good relationship with Japan, which may provide future opportunities for advocacy but, in turn, reduce the cogency of a principled position.

In 2013, Garkawe (103) argued that the Australian Government can take either an idealist or a practical position on the death penalty and expressed his preference for ‘quiet cooperation and diplomacy’. He continued:

Whether opposition to the death penalty should always trump other important policy goals of a nation, such as the need for cooperation with neighbours in an ever increasing globalized world, is a matter for debate. (Garkawe 2013: 103–104)

Whatever position abolitionist governments decided to take would be reasonable provided that they complied with domestic law and treaty obligations. However, with the announcement of the Strategy pledging to oppose the death penalty ‘in all circumstances for all people’ (Australian Government 2018: i) to achieve global abolition, the Australian Government *chose* to take an idealistic principled stand in a public manner. As such, the Australian Government’s pledge as a principled anti-death penalty advocate has been compromised in its dealings so far on the Agreement. Performativity reverses the idea that one’s

identity is the source of actions (Butler 1993). Instead, actions form one's identity, which, in turn, is negotiated and redefined through action (Butler 1993). In this sense, Australia's identity as an anti-death penalty advocate does not begin and end with the Strategy; it requires the government to act on its Strategy. The Australian Government's anti-death penalty advocacy is in its infancy. There is still space and time for the government to continue *doing* anti-death penalty advocacy and *be* an advocate. This article focused on the moral crusaders as labellers of wrongdoing concerning anti-death penalty advocacy. More broadly, however, labelling theory predicts that labels are likely to re-enforce deviant behaviour (Becker 1963). One could argue that the Australian Government's actions judged against its own pledge could have a knock-on effect on undermining the sincerity of other anti-death penalty crusaders. Further, it could create risks to the legitimacy of the anti-death penalty enterprise in the eyes of retentionist governments. The question that emerges from this discussion on the recent advent of the moral crusader enterprise is its possible negative impact on global anti-death penalty advocacy. Could the act of labelling and the action of moral crusaders backfire and entrench death penalty practice by retentionist states, feeding narratives of national exceptionalism, global marginalisation and isolationism?

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- <sup>1</sup> Civil society non-government organisations—such as Amnesty International and other local human rights organisations—can also be classified as moral crusaders (see Kim [2016] for a quantitative analysis of the impact of civil society on death penalty abolition). This article focuses on governments and the EU as moral crusaders.
- <sup>2</sup> According to Amnesty International (2021), the 10 countries that have persistently executed people during 2016–2020 are: China, Iran, Egypt, Iraq, Saudi Arabia, the US, Somalia, South Sudan, North Korea and Vietnam.
- <sup>3</sup> Legal pluralism originated as a way of understanding colonial or postcolonial legal systems characterised by the coexistence of more than one legal tradition. Critical legal pluralism applies it not only to legal systems but also to the very concept of law.
- <sup>4</sup> Australian Federal Police communicated with Indonesian authorities leading to Sukumaran and Chan's arrest for drug offences (Norman 2015).
- <sup>5</sup> Concerns include that several of the 19 capital offences do not comply with the requirement of limiting capital punishment to the 'most serious crimes' under the International Covenant on Civil and Political Rights, to which Japan is a party; individuals sentenced to death are kept in solitary confinement for periods of up to 40 years before execution; individuals sentenced to death are given notice only in the morning of their execution; families of individuals sentenced to death are notified after the execution has taken place; the confidentiality of meetings between death row inmates and their lawyers is not guaranteed; and requests for a retrial or pardon do not have the effect of staying the execution and are not effective (UN Human Rights Committee 2014b).
- <sup>6</sup> At the time of writing, the Joint Standing Committee on Treaties will inquire into the Agreement.
- <sup>7</sup> According to Article XXI(4)(b) of the Agreement, the Receiving State (e.g., Japan) has primary jurisdiction should a member of the Visiting Force (e.g., Australian Defence Force) or the accompanying Civilian Component commit an offence in Japanese territory, outside the performance of their official duties, against something other than the property or security of Australia, and against someone other than another member of the Australian Defence Force.
- <sup>8</sup> The Agreement states that both countries must 'assist each other in the arrest of members of the Visiting Force or the Civilian Component in the Receiving State and in handing them over to the authority which is to exercise jurisdiction' (Article XXI(5)(a) of the Agreement). The Annex relating to Article XXI of the Agreement provides that the obligation to render assistance is lifted where such assistance would be inconsistent with a country's obligations under international agreements. The Record of Discussion on Article XXI confirms that this refers to cases in which there is 'sufficient likelihood that as a result of such assistance, the person could be subject to the death penalty' (Department of Defence 2022: 8).
- <sup>9</sup> One could argue that there already is an uncomfortable precedent with the *Telecommunications Legislation Amendment (International Production Orders) Act 2021*. The Act allows Australian agencies to obtain international production orders that require designated communications providers overseas to intercept communications and provide access to stored communications and telecommunications data. It provides a fast process to facilitate mutual legal assistance. However, the Act fails to impose an obligation to obtain in writing a clear assurance from the foreign government that information provided from Australian sources will not be used in death penalty proceedings or in investigations of crimes that may attract the death penalty in their jurisdiction (Capital Punishment Justice Project 2020).
- <sup>10</sup> As a point of comparison, the current Agreement effectively reduces Australian sovereign claims to protect its citizens *below* the level applicable in the period when Australia was still within the Empire. Australian soldiers serving abroad in World War I as part of the



British imperial forces were immune from the death penalty. The legislation not only restricted the number of offences for which the death penalty might be applied but also made execution dependent on the approval of the governor-general (Finnane and Smaal 2020).

<sup>11</sup> There are cases of soldiers being tried in Japan: for example, during the post-World War II period under the British Commonwealth Occupation Force, Australian soldiers were convicted of rape and aiding the commission of rape and sentenced to lengthy periods of incarceration (Roberts-Pedersen 2014).

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