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The Council of Europe, Rights and Political Authority

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This paper examines the importance of human rights protection – in particular the European Convention on Human Rights – to the Council of Europe's survival as a political authority. Its underlying premise is that the proliferation of regional organisations in Europe in post-war Europe, and the creation of the Communities in 1958, contributed to a loss of a sense of purpose as to the Council of Europe's role in post-war Europe. Initial attempts to widen the scope of its political authority in relation to the Member States and other regional organisations were unsuccessful. It was, therefore, necessary for the Council of Europe to consolidate its existing mandate in ensuring the region's democratic security through human rights protection. Thus, led by its Parliamentary Assembly, Council of Europe institutions have, since 1949, provided the Member States with the necessary regional fora for examining and promulgating regional human rights legislation, such as the European Convention on Human Rights and its two additional protocols abolishing the death penalty.

Introduction

The European Convention on Human Rights (Convention, ECHR) forms the bedrock of the most advanced regional system of international human rights protection. Yet, very little is known of the organisation from which the Convention is derived. Created in the aftermath of the Second World War, the Council of Europe is the oldest regional organisation in Europe. As Europe's human rights watchdog, the Council of Europe facilitates the development and convergence of regional human rights norms. However, there is currently very little academic research on the Council of Europe within either International Relations or European Integration Studies. Furthermore, the literature on European human rights protection places greater emphasis on the Convention and the European Court of Human Rights (Court). To this end, the literature is legalistic, leaving a yawning gap in the Social Sciences on the Council of Europe's role in regard to European human rights protection, and in particular the Convention.

This limited research on the Council of Europe can be attributed to the following. First, political scientists have left the study of the Convention and its Court to lawyers and jurists on the grounds that they have the greater expertise. Second, the increasing and

more controversial impact of economic integration within the European Union (EU) has solicited greater interest among political scientists. However, given the EU's emerging formal interest in human rights protection, and its future accession to the Convention, the futures of the two regional organisations are likely to be increasingly intertwined.[1]

This paper seeks to fill this gap in the literature. It posits the importance of human rights definition and human rights protection to the Council of Europe's survival as a political actor in post-war Europe. It underscores the role of Council of Europe institutions in facilitating greater unity among the Member States through the regularisation of national human rights policies. The next section provides a critical review of present literature on the Council of Europe, and of its role in providing a regional framework for human rights protection. The section after offers an introduction to the Council of Europe and its human rights mandate. It also briefly outlines how each institution's mandate contributes to the organisation's wider human rights policies. To illustrate human rights norm development within the organisation, Section four examines how its institutions have developed and consolidated the Council of Europe's flagship human rights norm on the abolition of the death penalty in Europe.

An Analytical Survey of the Literature on the Council of Europe

The Council of Europe and State Socialisation

As the first to theorise the Council of Europe's role as a regional organisation, Checkel provides the necessary starting point from which to examine the relevant literature.[2] Checkel's work on the Council of Europe's socialisation role investigates how political actors internalise the organisation's regionally defined national membership norms on dual citizenship and the protection of national minorities. In turn, Schimmelfennig, Engert and Knobel, and Schimmelfennig place the Council of Europe's socialisation role within the wider context of the post-Cold War enlargement of Europe's regional organisations.[3] The contribution of both sets of literature to understanding the Council of Europe's role and human rights mandate is limited. The first limitation relates to the chronological period within which their studies were conducted, restricting their research focus to the post-Cold War era. This does not account for the Council of Europe's role in facilitating greater unity among Member States prior to 1990. The second limitation relates to the authors' research scope. Their analysis is restricted to its former communist Member States' compliance with Council of Europe political conditionalities, and their internalisation of regional membership norms. Thus, whilst these studies provide insight into the organisation's mandate, the emphasis on state socialisation does not adequately capture the essence of what the Council of Europe is, what it does, how it does it, and why any notice should be paid to its existence.

The Council of Europe, Political Authority and Regional Human Rights Norms

Jordan's empirical investigation tentatively draws a link between the Council of Europe's political authority and its former communist Member States' compliance with regionally defined human rights norms.[4] However, it falls short of an in-depth analysis into how human rights protection contributes to the Council of Europe's authority as Europe's

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regional rights arbiter, and to its role of facilitating greater unity among the Member States. Nonetheless, Jordan highlights the Council of Europe's moral authority and human rights guardianship as underpinned by its use of soft power. Its threats of expulsion and 'naming and shaming' are intended to ensure Member State compliance with the human rights obligations into which it has entered. Furthermore, in Jordan's analysis, the link between socialisation, political authority and regional human rights norms is illustrated by the Council of Europe's attempts to elicit compliance based on an appeal to common democratic values and a shared European identity.

Analysis into how the Council of Europe's human rights framework is used to 'lock-in' domestic norms and conduct is not restricted to the post-Cold War era. Moravcsik's investigation into the origins of Europe's human rights regime provides the necessary intellectual backdrop to the importance of regional rights definition and rights protection to the Council of Europe's raison d'être.[5] Moravcsik employs Republican-Liberalism to discount Realist and Ideational explanations in which weaker states' support for the Convention and its' binding instruments was based on either coercion or normative suasion by the established, and thus more powerful democracies. Instead, Europe's human rights regime emerged from the 'domestic political self-interest of national governments' (Ref. 5, p. 220). For Moravcsik, the Convention and the Court's compulsory jurisdiction facilitated the new democracies' attempts to consolidate and safeguard their internal domestic arrangements against future non-democratic alternatives. However, Moravcsik's Republican-Liberalism does not explain the deepening of the Strasbourg human rights regime, the Council of Europe's rights-based political authority, or its contribution to ensuring greater unity among the Member States.

The recent literature offers a more considered analysis of the Council of Europe and its human rights standard. Bae and Yorke examine how the Council of Europe's human rights discourse on the death penalty led to its abolition in the Member States.[6] Bae and Yorke's use of official documentation illustrates how analysing the institutions' rights-based discourse contributes to our understanding of how the Council of Europe develops Europe's human rights norms.

The Council of Europe, Institutionalism and Intergovernmentalism

The inherent tension between State sovereignty and human rights protection common to both Moravcsik and Yorke's analyses defines this last set of literature on intergovernmentalist and institutionalist explanations of the Council of Europe's authority. For Sasse, Member State bargaining is important to facilitate the continued evolution in the Council of Europe's foundational norms.[7] Without the requisite Member State internal belief in the rightfulness of such a role, the Council of Europe would lose its raison d'être. Brummer, however, questions the effectiveness of protecting human rights within the Council of Europe's intergovernmental framework.[8] Although it monitors compliance with the human rights obligations into which the Member States have entered, the Council of Europe does not have the requisite competences to act on state violations and deficiencies. To this, Brummer proposes three solutions: strengthening existing institutions by equipping them with 'teeth'; creating new institutions endowed with the power to impose binding decisions upon the Member States; or, strengthening cooperation with other institutions such as the EU's Fundamental Rights Agency.

This lack of Member State volition to enhance human rights intergovernmentalism resonates with MacMullen's analysis of decision-making and policy implementation in the Council of Europe.[9] MacMullen notes the absence of political will within the Committee of Ministers in respect to Member State bargaining in pursuit of nationally defined state preferences. For MacMullen, the absence of clear national political leadership has contributed to the Council of Europe's sustained human rights policy outputs. To this, Lovecy draws on New Institutionalism in order to explain the Council of Europe's relative autonomy in providing the Member States with a regional rights framework within which to define and protect rights in Europe.[10] Here, institutions matter: the Council of Europe shapes actor loyalty, preferences and identity.

The Council of Europe: Origins, Rights and Institutions

Origins of the Council of Europe and its Convention

The Council of Europe was created in the aftermath of the Hague Congress of 8–10 May 1948, which explored the possibilities of long-term cooperation among European states within the context of a pan-regional European Assembly. The Council of Europe was novel in that Article 3 of its Statute restricted its membership to democracies, thus distinguishing it from other emerging international and regional organisations.[11]

As Europe's first major post-war regional organisation, the Council of Europe was intended to avert the possibility of another war by contributing to the safeguard of Western democracies against the threat of Soviet communism, and potential German militarism.[11] As an 'association of democratic states',[12] the Council of Europe's values-based approach to European integration was intended to reinforce Member State commitment to pluralist democracy, the rule of law and, the protection of human rights and fundamental freedoms. Accordingly, the Preamble of its Statute appeals to the 'spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'. These values appeal to the Member States' cumulative moral heritage based on Greek philosophy, Roman law, Christianity, and the French Revolution.[11,12,13] As Trommer and Chari highlight, the Council of Europe's aims are rooted in 'pacifism, transnationalism and human rights'.[14] Within this context, the Convention still remains the Council of Europe's most notable achievement.

Concluding the Convention within the Council of Europe ensured the regional organisation would act as an external arbiter, monitoring Member State compliance with the human rights obligations into which it had entered. Membership of the Council of Europe was thus intended to 'lock' the Member States – both founding and future – into a habit of compliance with the emerging regional human rights norms. Forsythe's description of the Convention as a 'quasi-constitutional regional bill of rights for Europe' clearly illustrates its importance to the Council of Europe's attempts to ensure the region's democratic security through human rights protection.[15]

The human rights principles outlined in the Council of Europe's Statute only became justiciable when the Convention entered into force on 3 September 1953, and following the creation of the Strasbourg Court on 21 January 1959. However, the origins of what

was to become the Convention predate the Council of Europe's founding on 5 May 1949. These can also be found in the principles that underpinned the Hague Congress of 1948. For participants at the Hague Congress, the importance of a European Assembly to the safeguard of individual rights and democratic representation was two-fold. First, the future 'Council of Europe' would provide its Member States with an institutionalised setting within which to cooperate and conclude regional policies, such as the Convention and its subsequent additional protocols. Second, it would act as a regional chamber of representation for European public opinion. A Charter of Rights would complement the principle of democratic representation. In turn, the creation of a regional human rights court with effective sanctions would strengthen both human rights protection and democratic representation within the envisaged regional assembly of democratic states.[16]

A General Framework for Europe?

At its creation, the Council of Europe represented the most ambitious attempt to build an all-encompassing model of political organisation at the regional level. However, for the Council of Europe and its observers alike, the mass institution building that followed resulted in a perceived loss of a sense of purpose as to its own mandate.[17] In response, the Council of Europe actively sought to establish itself as a political actor,[18] and considered its role as that of developing the general framework for European policy.[12]

At this time, the process of European integration within Western Europe was unfolding on two fronts. *Little Europe* was composed of the Benelux states, France and Italy, which were prepared to accept the creation of European institutions with some supranational powers. Given the Council of Europe's principle of democratic representation, its primary role was to represent and shape European public opinion. Accordingly, it would act as an umbrella organisation, providing the necessary parliamentary representation to fledgling organisations in Europe.[13,19] This, in time, would favour the Council of Europe's evolution from a deliberative body to a regional organisation with real powers.

Conversely, *Greater Europe* was composed of Little Europe, Ireland, Scandinavia and the United Kingdom. Perceptions of the Council of Europe in Denmark, Ireland, Norway, Sweden and the United Kingdom were generally hostile. Their initial opposition to the Council of Europe's authority crystallised in a disdain for its Parliamentary Assembly. The Council of Europe was dismissed as a 'debating society for European parliamentarians, with an intergovernmental organisation incongruously attached to it' (Ref. 19, p. 131). This disdain was attributed to the Parliamentary Assembly's role as a supplementary and extra-national institution specifically created to express, represent and formulate European public opinion.[20] That is, the Council of Europe's political authority was limited by the fear within the Member States that the Parliamentary Assembly would become a mouthpiece for a concerted European public opinion. The following assessment from an address made at the Royal Institute of International Relations on 19 February 1952 illustrates national governments' fear of the Parliamentary Assembly. It is an address by Mr Robert Boothby, a British parliamentary delegate for the Conservative Party to the Council of Europe's Parliamentary Assembly from 1949 to 1958:

> We must reconcile ourselves to the fact that not only the British Foreign Office but even, in some degree the Quay d'Orsay, and all the rest, are naturally hostile to this alien

> organisation which has sprung up at Strasbourg and has started talking about things that pertain to them, and are better not discussed in public anyway – that matter too much to the peoples of the world to be discussed in front of the peoples of the world.[21]

Member States' fear was unfounded. The insufficient media coverage of the organisation's activities contributed to its failure to galvanise the necessary public support.[22] Additionally, the Committee of Ministers' served as the necessary intergovernmental and anti-federalist check to the otherwise integrationist Parliamentary Assembly.[19] This tendency towards intergovernmentalism limited the Council of Europe's decision-making powers to what the majority of its founding Member States had initially intended. Its political powers were to be those of an organisation, which sought 'democratic consolidation *within*' and not the 'democratic control *of*' its Member States (Ref. 21, p. 333, emphasis added). By restricting the Parliamentary Assembly's powers to those of a deliberative institution, the Member States hoped to forestall its development into a legislative body with political authority akin to that of the present directly elected European Parliament.

Despite attempts made between 1949 and 1955 to garner support for its role as a political authority with limited functions but real powers,[23] the Council of Europe is still considered to have limited political authority. Authors dating back to Smithers[11] and, more recently Bitsch and Haller have argued that since its creation, the Council of Europe's political authority has been relegated to that of a mere talking-shop on the processes of European integration.[12,16,20]

The Council of Europe's Human Rights Mandate

Since the end of the Second World War, the Council of Europe has provided its Member States with the necessary institutionalised setting within which to examine policies governing relations between States, and most importantly, between the State and its subjects. Law-making in the Council of Europe was considered an important feature in order to consolidate the principles of democracy and human rights protection. This article posits the importance of regional human rights definition and human rights protection to the Council of Europe's survival as a political actor. In order to establish, and indeed, maintain its political authority, the Council of Europe sought to consolidate its mandate in ensuring the region's democratic security through human rights protection. The following reasons illustrate why the Council of Europe's human rights role is central to its envisaged aim of facilitating greater unity among the Member States.

The first relates to the importance of applying the organisation's membership criteria on human rights and democracy when admitting new, and retaining established members. The Council of Europe's Statute enshrines in law the organisation's fundamental role of providing a regional framework for human rights protection. This legal provision is included under Article 1(b) of its Statute, which outlines the organisation's human rights mandate, and under Article 3, which outlines its membership criteria. As a reminder, these are pluralist democracy, the rule of law and the protection of human rights and fundamental freedoms.

The second reason relates to the process by which decisions are reached, and by which international agreements are concluded. Although the Council of Europe's authority is

limited to that of a deliberative body, its role as a deliberative organisation is important for the following two reasons. On the one hand, its institutions, committees, conferences and summits provide fora for examining policy proposals. On the other hand, and drawing on the preceding paragraph, it has the necessary legal remit to translate normative principles into international legal standards regulating Member State conduct towards citizens and non-citizens.

The Council of Europe's democratic membership criterion and its deliberative role form the wider context within which the organisation's human rights mandate is to be understood. However, in order to fully examine the Council of Europe's human rights mandate, it is necessary to assess how its institutions contribute to the organisation's wider human rights remit. Analysing how each institution's human rights mandate contributes to the organisation's wider role as Europe's rights watchdog is also important for reasons highlighted in the following comparison between the Council of Europe and the Organisation of American States (OAS). As noted, the Council of Europe's human rights remit is enshrined under Article 1(b) and human rights protection is a membership criterion outlined under Article 3. The Council of Europe's Statute does not, however, expressly define *how* this mandate should be executed. This is in stark contrast with the OAS.

The OAS's role in providing an institutionalised framework for human rights protection is clearly outlined under Article 3(l) of its founding Charter: 'The American States proclaim the *fundamental rights of the individual* without distinction as to race, nationality, creed or sex' (emphasis added). Contracting Parties' obligation to protect rights is then outlined under Article 17: 'each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, *the State shall respect the rights of the individual and the principles of universal morality*' (emphasis added). Greater still is the importance attributed to the need for an institution to monitor Member State commitment to human rights protection in the Americas. This is outlined under Article 106:

> There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

The Inter-American Commission on Human Rights was created on 18 August 1959. Its competences are outlined in the American Convention on Human Rights (ACHR) of 22 November 1969, which entered into force on 18 July 1978. Under Article 33 of the ACHR, the Inter-American Commission on Human Rights' shall contribute 'to the fulfilment of the commitments made by the State Parties to this [American] Convention'. More specifically, its main remit is 'to promote respect for and defence of human rights' (Article 41).

Thus, unlike the OAS Charter, which details the formation of an Inter-American Commission on Human Rights, the Council of Europe's Statute does not provide for the necessary institutions to develop and execute its human rights mandate. Consequently, it is important to examine how its different institutions have defined and developed their individual human rights mandates, in relation to their wider remits and authority.

Institutions and Human Rights Protection

The Committee of Ministers' is composed of the Ministers of Foreign Affairs from the 47 Member States. Its quasi-judicial human rights mandate is outlined under Article 46 of the Convention, in which it shall supervise the execution of the Court's judgments in the Member States. It holds quarterly human rights sessions during which it considers the outcome of each case. When each case has been concluded, it adopts a final and public resolution. Alternatively, an interim resolution is adopted in cases where further information is required on 'the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'.[24] That is, an interim resolution is adopted to ensure the respondent State institutes the necessary measures to prohibit further violation of the Convention right(s). The Committee of Ministers' human rights mandate also facilitates the adoption of human rights treaties, and it proposes non-binding recommendations to the Member States. It is also appoints members to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and to the European Social Charter Committee. Previously, it appointed members to the former European Commission on Human Rights. Finally, the Committee of Ministers serves as the monitoring body for the Framework Convention for the Protection of National Minorities.

The Parliamentary Assembly's Committee on Legal Affairs and Human Rights is responsible for its human rights mandate. It has four sub-Committees, each responsible for a particular policy area: human rights; crime related problems and terrorism; the rule of law; and the election of judges to the Strasbourg Court. Each committee has a system of rapporteurs and fact-finding missions, and its conclusions are presented in the form of a final report. These conclusions often form the basis of the Parliamentary Assembly's proceedings – recommendations, resolution and opinions – to the Committee of Ministers, Member States, or other Council of Europe institutions. Despite its important contribution to the Council of Europe's wider role of facilitating greater unity among the Member States through human rights protection, the Parliamentary Assembly's powers are still limited to those of a deliberative body.

The European Commissioner for Human Rights (Commissioner) is the Convention's diplomatic and non-judicial institution. It does not examine individual complaints, and its diplomatic role complements other Convention instruments: the Court and the Committee of Ministers. It was created under Statutory Resolution 99(50), and is an independent institution *within* the Council of Europe.[25] The Commissioner alone interprets the abstract mandate outlined under Statutory Resolution 99(50).[26] To encourage the Member States to protect human rights, the Commissioner's mandate is fulfilled through informational and educational awareness campaigns, official country missions and promoting the development of national human rights institutions.

The Human Rights Directorate (Directorate) provides assistance to the Secretariat and the Committee of Ministers on matters relating to human rights and the rule of law. The Directorate facilitates conditions for Member State cooperation in the field of human rights and the rule of law. It provides legislative expertise, promotes accession to treaties, and supports Member State compliance with Council of Europe standards. The Directorate

oversees the Council of Europe's monitoring functions and comprises the secretariats of the organisation's independent monitoring bodies. In this capacity, it supports the Committee of Ministers' supervisory role under Convention Article 46. As a standard-setter, the Directorate prepares Council of Europe conventions and other agreements. It is also responsible for Council of Europe human rights cooperation with the EU, Organisation for Security and Cooperation in Europe, and United Nations.

The European Commissioner for Democracy through Law was created under Resolution (90)6 on the Partial Agreement Establishing the European Commission for Democracy through Law of 10 May 1990. Owing to its geographical location, the Commission is more commonly known as the Venice Commission (VC). As an independent consultative body specialising in constitutional law, its initial remit was to align the constitutions of its newly democratic Member States with the Council of Europe's principles of rights, democracy and the rule of law. As a Partial Agreement, the VC's membership was initially restricted to the Council of Europe's former communist Member States. Following the Council of Europe's enlargement, the VC is now an Enlarged Partial Agreement.[27] As an Enlarged Partial Agreement, the VC's membership extends to both willing Council of Europe and non-Council of Europe Member States, which at the time of writing is 58. Its remit on democracy through law remains unchanged.[28]

Rights and Political Authority: Abolishing the Death Penalty

The Council of Europe and the Death Penalty

The Council of Europe's flagship human rights policy on the abolition of the death penalty will illustrate the role of its institutions in regional norm development.[29] Council of Europe institutions are central to the organisation's role of facilitating greater unity among Member States, as provided for under Article 1(b) of its Statute. The institutions' abolitionist discourse and Council of Europe treaties have resulted in the *de facto* pan-regional abolition of the death penalty in Europe. Belarus remains the only European country that still employs the death penalty and is, thus, not a Council of Europe Member State. Whilst norm development in the Council of Europe has resulted in the regularisation of domestic law, Convention Article 2(1) still allows for the death penalty in the Member States that have not ratified the two abolitionist protocols.[30] It reads, 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally *save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*' (emphasis added).

The Parliamentary Assembly has played a pivotal role in the emergence, development and consolidation of the pan-European norm on the abolition of the death penalty. The 'Motion for a Resolution on the abolition of the death penalty' tabled by Swedish MP Astrid Bergegren on 16 May 1973 initiated this trend towards abolition.[31] However, archival documents show that the Parliamentary Assembly initially resisted debating the death penalty and its abolition. In 1974, the Parliamentary Assembly mandated its own Legal Affairs Committee to investigate the death penalty within Council of Europe Member States.[32] In January 1975, the Legal Affairs Committee refused to submit a report on this subject, and offered two reasons for this refusal.[33] First, the Legal Affairs Committee

argued that when faced with the threat of terrorism, European public opinion would oppose any attempt to abolish the death penalty. During this time, Turkey faced terrorist threats from the Turkish organisation led by Abdullah Öcalan, which in 1978 became the Kurdish Workers Party (PKK). The United Kingdom faced terrorist threats from the Irish Republican Army (IRA). Second, the Legal Affairs Committee argued that the Council of Europe's intergovernmental Committee of Ministers was likely to oppose any Parliamentary Assembly Recommendation that would infringe Member State sovereignty and security.[34] At this refusal, the then Rapporteur on the issue of the death penalty – Henrik Lidgard (MP Sweden) – resigned in January 1976. In May 1976, the issue was duly struck off the Parliamentary Assembly's agenda. Between May and August 1976, no other Council of Europe had the necessary mandate to examine the death penalty and its abolition.

In September 1976, the subject of the death penalty was back on the agenda. Led by Amnesty International, the Council of Europe's Conference of International Non-governmental Organisations urged the Committee of Ministers to initiate a discussion on the death penalty in the Member States.[35] This rallying call to action would culminate in an international conference on the 'Abolition of the Death Penalty' in Stockholm in December 1977. On 21 June 1978, the Austrian Delegation to the Conference of European Ministers of Justice presented a Memorandum on the 'Question of the Death Penalty'. This external intergovernmental impetus to the Parliamentary Assembly's previous attempts to debate this issue reiterated the need to examine the death penalty in light of the 30th anniversary of the United Nations Universal Declaration of Human Rights, and the 25th anniversary of the Council of Europe ECHR's entry into force. Resolution No. 4 adopted at the 11th Conference of European Ministers of Justice recommended that 'the Committee of Ministers of the Council of Europe study the possibilities for the elaboration of new and appropriate European standards concerning the abolition of the death penalty'.[36] During this time, three abolitionist states acceded to both the Council of Europe and its Convention: Portugal on 22 September 1976; Spain on 24 November 1977; and, Liechtenstein on 23 November 1978.

This combination of new abolitionist Member States and intergovernmental consensus presented in the form of Resolution No. 4 allowed the Parliamentary Assembly to renew its calls for the abolition of the death penalty. As the Austrian Memorandum had stated, there was now a need 'to examine the possibilities for the establishment of comprehensive international obligations for the abolition and non-reintroduction of the death penalty within the framework of European protection of human rights as it is safeguarded in particular by the European Convention on Human Rights'.[37] Rapporteur Carl Lidbom's (MP Sweden) report of 18 March 1980 on the state of the death penalty in Europe initiated Parliamentary Assembly Recommendation 727(1980) to the Committee of Ministers. Recommendation 727(1980) underscored the need to amend Article 2(1) by removing the death penalty clause.[38]

The Lidbom Report thus further emphasised that the regional mood was now ripe for abolition.[39] Resolution No. 4 was then adopted at the 12th Conference of European Ministers of Justice of 20–21 May 1980. It emphasised that 'Article 2 of the European Convention on Human Rights does not adequately reflect the situation actually attained

in regard to the death penalty in Europe'.[40] The European Ministers of Justice also called for the 'Committee of Ministers [to] amend Article 2 of the European Convention on Human Rights [and] bring it into line with Assembly Recommendation 727(1980)'.[41] On 10 September 1981, the Ministers of Justice reiterated this pledge, expressing 'a great interest in every national legislative action aimed at abolishing capital punishment and in the efforts undertaken in the same sense at the international level, notably within the Council of Europe'.[40] On 25 September 1981, the Committee of Ministers' Deputies voted in favour of preparing a treaty in light of the Parliamentary Assembly's Resolution 891(1980), which '[appealed] to the parliaments of those member States of the Council of Europe which have retained capital punishment for crimes committed in times of peace, to abolish it from their penal systems'.[41] The Committee of Ministers' Deputies issued the Steering Committee on Human Rights *ad hoc* terms of reference 'to prepare a draft additional protocol to the European Convention on Human Rights abolishing the death penalty in peacetime'.[41] Following the Committee of Ministers Deputies' meeting of 6–10 December 1982, additional Protocol No. 6 to the Convention opened for signature on 28 April 1983, and entered into force on 1 March 1985. It is the first of two additional Protocols to the Convention's Article 2 on the Right to Life. Protocol No. 6's main provision prohibits the peacetime use of the death penalty. It reads, 'the death penalty shall be abolished. No one shall be condemned to such a penalty and executed' (Article 1).

With the ratification of additional Protocol No. 6 underway as of 28 April 1983, subsequent discussion aimed to further amend the Convention began in 1989. Between 1983 and 1989, the international political landscape was becoming increasingly conducive to both peacetime and wartime abolition. During this period, the absence of discussion on the death penalty at the regional level was paralleled by its *de facto* or *de jure* abolition in established Council of Europe Member States.[42] The abolition of the death penalty in these Member States precipitated further amendment to the Convention at the regional level.

This gradualist approach to the abolition of the death penalty was not extended to the Council of Europe's post-Cold War Member States. Stabilising the democratic transition of former communist states was considered necessary to ensure the region's democratic security, and their membership of Europe's regional organisations.[43] In 1989, accession to the Convention and its Protocols became an unofficial requirement. On 5 May 1989, Finland was the first to accede to both the Council of Europe and its Convention. On 10 May 1990, it ratified the Convention, and additional Protocol No. 6. This membership condition was then clearly outlined in the Parliamentary Assembly's Opinion No. 182(1994) concerning the Principality of Andorra's membership of the Council of Europe. Since 4 October 1994, the following membership criteria have been applied to all new Member States: they must sign the Convention immediately upon accession, and full membership would then be granted upon ratifying the Convention within twelve months of the signature date. For Member States that had not yet abolished the death penalty, the introduction of moratoria on executions was mandatory upon accession. Since the last execution in Ukraine in 1997, the death penalty has not been employed in the Council of Europe legal space.

Following Rapporteur Hans Göran Frank's (MP Sweden) inventory of the state of the death penalty in the Greater Europe, the Parliamentary Assembly adopted Recommendation

1246(1994) on 4 October 1994. It urged the Committee of Ministers to adopt supplementary legislation to prohibit the use of the death penalty at all times. The restraint that had characterised the Committee of Ministers' approach to peacetime abolition was equally reflected in its reticence to abolishing the use of the death penalty during wartime or the imminent threat of war. In response to the Steering Committee for Human Rights' Opinion of 5 May 1995 in favour of an additional protocol abolishing the death penalty in all circumstances,[43] the Committee of Ministers refused to amend the Convention, and merely maintained its call for non-abolitionist Member States and guest Member States to adopt and honour moratoria on the death penalty.

It was, therefore, not until its meeting of January 2001 that the Committee of Ministers' Deputies provided the Steering Committee on Human Rights and its Sub-Committee of Experts for the Development of Human Rights with *ad hoc* terms of reference 'to submit its views on the feasibility of a new protocol on this matter'.[44] On 21 February 2002, the Committee of Ministers' Deputies adopted draft additional Protocol No. 13 to the Convention. It abolishes the death penalty in all circumstances. It was opened for signature on 3 May 2002. Article 1 reads, 'the death penalty shall be abolished. No one shall be condemned to such penalty or executed'. With its entry into force on 1 July 2003, Europe has now become a *de facto* death penalty free region. The *de jure* abolition of the death penalty awaits Armenia, Azerbaijan and Poland to ratify additional Protocol No.13, and for Russia's moratorium to extend to full abolition.

Abolishing the Death Penalty: Rights and Values

The preceding analysis on the death penalty exemplifies the manner in which the Council of Europe's human rights role has contributed to the regional regularisation of the Member States' human rights policies. In an attempt to draw potentially generalisable reasons as to why Member States are willing to be bound by the Council of Europe human rights norms and legislation, this section will now examine why the organisation's ability to perform its rights-based mandate on the death penalty should be justified by shared rights and values – and not merely intergovernmental authorisation. Three key justifications emerge from Council of Europe human rights institutions' discourse on the death penalty.

First, the Council of Europe's role as the region's rights watchdog offers a significant contribution to the problem of *incomplete contracting* in respect of the Convention and the abolition of the death penalty in Europe. Such a justification can be understood with reference to Yorke's analysis on Council of Europe Member States' sovereign right to employ the death penalty, as allowed for under Article 2(1) of the Convention.[45] The Convention was opened for signature on 4 November 1950, in the immediate aftermath of the Second World War. The need to uphold the rule of law for crimes perpetrated during the war, and respect for the Member States' sovereign right to the death penalty justified the absence of a Convention clause to prohibit the death penalty. The abolition or retention of the death penalty was for individual Member States to decide.[45]

However, the Convention drafters could not have foreseen the deepening of liberal democratic rule in Western Europe, and its extension to post-communist European states through economic integration in Brussels and human rights protection in Strasbourg.

Most importantly, the Convention drafters could not have foreseen the increasing significance attributed to the Convention as an instrument to protect individual rights, and not merely an instrument to forestall future regional wars.[11] Since the Convention's entry into force on 3 September 1953, the Council of Europe and the Strasbourg Court have sought to bridge the gap between original intent and present-day normative conditions in Europe.[46] To illustrate, the Council of Europe's importance in brokering new member state obligations was recognised in the following extract from the Committee of Ministers during the drafting of additional Protocol No. 6. In the absence of a regional rights arbiter to balance Member States' interests with human rights protection, there would be a

> risk of thus creating, in the area of human rights, a Europe moving forward on two or several planes (representing different shades of abolitionist and anti-abolitionist opinion), or even a Europe in which each country went its way, weakening at the same time the consensus of the [then] 21 States on fundamental rights that they had expressed in the European Convention on Human Rights and Fundamental Freedoms.[41]

Second, the general understanding of *human rights as universal principles* offers an additional reason as to why the Council of Europe's human rights mandate should be justified by shared rights and values, and not mere intergovernmental authorisation. The liberal conception of human rights protection underpins the Strasbourg human rights regime. Here, importance is attributed to equal human dignity and equal respect. Council of Europe justifications for the abolition of the death penalty make reference to the need to ensure continued Member State compliance, so as to maintain the Convention's normative integrity, and for the universal nature of its enshrined rights.

The third reason as to why the Council of Europe's role in abolishing the death penalty should be justified by shared rights and values relates to the importance of regional rights protection to facilitate regional democratic consolidation. The pragmatic liberal approach espoused by the Council of Europe recognises that improvements in Member State compliance with regional human rights standards is more likely to be met within, and not externally to, the organisation's regional human rights framework. This assumes human rights as universally valid in that, for all Council of Europe Member States – and beyond – human rights protection has become the normative benchmark against which to assess one's own, and others' political values and conduct. Included within this human rights criterion, is the pan-regional norm on the abolition of the death penalty. The 'mild compulsion' exerted by the organisation and its 'compliance audits' are intended to ensure Member State compliance.[47] Thus, the Council of Europe's authority is assured through Member States' continued compliance with the obligations into which they have entered into with respect to the Statute and the Convention.

Conclusion

This article examined the importance of regional human rights definition and human rights protection to the Council of Europe's survival in post-war Europe. The post-war proliferation of regional organisations in Europe, and the creation of the Communities in 1958 contributed to a loss of a sense of purpose as to the Council of Europe's own role in

post-war Europe. Initial attempts to widen the scope of its authority in relation to the Member States and other regional organisations were unsuccessful. It was, therefore, necessary for the Council of Europe to consolidate its existing mandate to ensure the region's democratic security through human rights protection. Analysis of how the death penalty was abolished provided insight into the Council of Europe's role and contribution to the definition and consolidation of the region's human rights norms. Such analysis would indicate the Member State acceptance of the Council of Europe's role in providing a regional rights framework. However, the Committee of Ministers' discourse on the death penalty illustrates that whilst there is generalised support for the Council of Europe's more autonomous human rights role, such support is only provided for if the organisation's outputs correlate with those envisaged by Member States. This, as is known, relates to the Council of Europe's role in reinforcing its Member States' own claims to democratic legitimation. This normatively charged definition of legitimate political authority in Europe provides the Council of Europe with the requisite normative legitimacy, with which to ensure the Member States comply with this Council of Europe norm on the abolition of the death penalty. There exists, therefore, a symbiotic relation between the need to ensure the normative integrity of its foundational norms as enshrined under the Convention, and the Council of Europe's political authority. Without one, the other cannot exist – or at least not in its present form.

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    - 16 April 1948: Organisation for European Economic Cooperation, which later became the Organisation for Economic Cooperation and Development on 14 December 1960;
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    - 18 April 1951: European Coal and Steel Community;
    - 25 March 1957: European Economic Community, European Atomic Energy Community.
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