

AUSTRIA AND THE EUROPEAN UNION — THE REPORT OF THE ‘THREE WISE MEN’

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International organisations have long been in the business of monitoring the human rights practices of their member states. The result of such monitoring is usually a report, resolution, or statement, which indicates if the member has lived up to its various international obligations. Whether or not an international organisation may proceed with enforcement action against a state in breach of human rights standards depends on a number of factors, including the powers contained in its constitutive instrument and the political will of its members. Despite the fact that a complete human rights system should include standard-setting, supervision and enforcement mechanisms,¹ international organisations only rarely attempt to enforce a member’s compliance with international human rights law. Enforcement techniques in international organisations may range from non-coercive mechanisms, involving international exposure and the ‘mobilisation of shame’,² to formal sanctions, including suspension from the organisation’s decision-making process and expulsion (being the most drastic option).³

The European Union (‘EU’) is the latest international institution to raise the spectre of formal sanctions against a member state for failure to abide by human rights standards. Article 6(1) of the consolidated version of the *Treaty on European Union 1992* (‘TEU’)⁴ states that ‘the Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.’ Fundamental rights are defined in terms of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (‘ECHR’)⁵ and the principles common to the constitutional traditions of member states, as principles of European Community law.⁶ According to the TEU, membership applications for the EU are to be judged according to these standards.⁷ The three criteria set down by the Copenhagen European Council

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¹ Karel Vasak lists the five components of a complete human rights system at the international level as information, investigation, conciliation, decision and sanction: Karel Vasak, ‘The Distinguishing Criteria of Institutions’ in Karel Vasak (ed), *The International Dimension of Human Rights* (1982) vol I, 218–20.

² Frederic Kirgis, *International Organisations in Their Legal Setting* (2nd ed, 1993) 524.

³ Henry Schermers and Niels Blokker, *International Institutional Law* (3rd ed, 1995) 97.

⁴ Opened for signature 7 February 1992, 1778 UNTS (entered into force 1 November 1993).

⁵ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952).

⁶ TEU, above n 4, art 6(2).

⁷ Ibid art 49.

(‘Council’) for the admission of the Central and Eastern European Countries also indicate that stable political institutions guaranteeing democracy, the rule of law, respect for human rights and the protection of minorities, are central factors in admission decisions.⁸

Not only are human rights issues relevant to membership applications, but they also determine whether or not an existing member will be excluded from the EU. Article 7(1) of the *TEU* enables the Council (after fulfilling certain procedural requirements) to ‘determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)’. If a decision is made that the relevant principles have been breached, the Council may suspend certain rights under the *TEU*, including voting rights in the Council. Thus article 7 enables a member to be suspended solely on the basis of whether it has fulfilled the requirements of human rights, democracy and the rule of law, despite the fact that the organisation in its original form was principally designed to provide economic integration in Europe. Whereas human rights concerns have always been relevant to the European Communities as an adjunct to economic integration, they are now central to the EU’s membership criteria at both the admission and exclusion stages.

The potential scope of articles 6 and 7 has been demonstrated by the EU’s response to the formation of the coalition government between Austria’s ‘People’s Party’ and Jörg Haider’s Freedom Party (‘FPÖ’) in Austria on 3 February 2000. The FPÖ has been described as a ‘right wing populist party with extremist expressions’.⁹ Party officials have made statements that can be interpreted as xenophobic and which indicate praise for Austrian Waffen SS veterans.¹⁰ Earlier this year, the EU acted swiftly to address these developments. On 31 January 2000, the Portuguese Prime Minister, Jorge Sampaio, who at that time held the Presidency of the EU Council, together with the other 13 European leaders, implemented a number of sanctions. First, the member states indicated that they would not accept bilateral contacts at the political level with an Austrian Government which had integrated the FPÖ.¹¹ Second, members would not support Austrian candidates seeking positions in international organisations. Third, Austrian ambassadors to EU capitals would only be received at a technical level.¹² A number of bilateral relations were subsequently severed.¹³

⁸ *Agenda 2000 — Summary and Conclusions of the Opinions of Commission concerning the Applications for Membership to the European Union Presented by the Candidate Countries*, 15 July 1997 <<http://www.eurunion.org/legislat/agd2000/opinsumm.htm>> at 10 December 2000.

⁹ *Report by Martti Ahtisaari, Jochen Frowein, and Marellino Oreja*, adopted in Paris on 8 September 2000, [92] (‘Report’) <<http://www.virtual-institute.de/en/BerichtEU/index.cfm>> at 12 December 2000.

¹⁰ Ilias Bantekas, ‘Austria, the European Union and Article 2(7) of the UN Charter’, *ASIL Insights*, February 2000 <<http://www.asil.org/insigh40.htm>> at 12 December 2000.

¹¹ *Ibid.*

¹² *Austria — Statement from the Portuguese Presidency of the European Union on behalf of XIV Member States*, 31 January 2000 <<http://www.portugalemb.org/press/36.html>> at 10 December 2000.

¹³ Bantekas, above n 10.

The Austrian Government issued a statement claiming that the EU's action itself violated 'fundamental legal principles and the spirit of the European Treaties', including the recognition of a democratic government committed to the rule of law.¹⁴

In June 2000, the XIV EU members, through the President of the European Court of Human Rights, requested three European figures to prepare a report on the evolution of the FPÖ and the Austrian Government's commitment to common European values, including the rights of minorities, refugees and immigrants.¹⁵ After meeting with governmental and non-governmental officials, the 'three wise men' (as they have been referred to) submitted their report on 8 September 2000.¹⁶ The *Report* is an important document in the development of the EU's human rights policy: first, for its examination of 'common European values'; and secondly, for its support of human rights implementation mechanisms within the EU context.

The *Report* begins with an examination of the legal instruments which provide the background to the commitment in article 6 of the *TEU*. The authors draw attention to the *ECHR*, the *Framework Convention for the Protection of National Minorities*,¹⁷ the *Convention Relating to the Status of Refugees*,¹⁸ the *Declaration Against Racism and Xenophobia*¹⁹ and the new *Draft Charter of Fundamental Rights*.²⁰ Specific mention is made of the fact that Austria is the only country which gives the *ECHR* full constitutional rank.²¹ After introducing the legal situation, the *Report* examines the position of minorities, refugees, and immigrants in Austria, as well as the Government's efforts to fight racism, anti-Semitism, discrimination and xenophobia. The *Report* highlights Austria's constitutional obligation to respect, secure and promote the language and culture of Austria's national minorities,²² and finds that Austria protects its minority groups to a greater extent than many other EU countries.²³ In relation to

¹⁴ 'Action Programme of the Federal Government for the Lifting of Sanctions', 5 May 2000 <<http://www.bmaa.gv.at/oesterreich/index.html.en>> at 12 December 2000.

¹⁵ The *Report* was prepared by: Martti Ahtisaari, former President of Finland; Jochen Frowein, Director of the Max Planck Institute for Comparative Public Law and International Law at Heidelberg (former Vice-President of the European Commission of Human Rights); and Marcelino Oreja, President of the Institute of European Studies of the San Pablo-CEU University (former Spanish Minister of Foreign Affairs, former Secretary-General of the Council of Europe, former member of the Commission of European Communities).

¹⁶ *Report*, above n 9.

¹⁷ Opened for signature 1 February 1995, ETS No 157 (entered into force 1 February 1998).

¹⁸ Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

¹⁹ Joint Declaration by the European Parliament, the Council and the Commission against Racism and Xenophobia, 11 June 1986 (OJ C 158, 25.6.1986), extracted at *European Union Anti-Discrimination Policy: From Equal Opportunities Between Women And Men To Combating Racism* <<http://www.europarl.eu.int/dg4/wkdocs/libe/102/en/text5.htm#annex1>> at 13 December 2000.

²⁰ <CHARTER 4487/1/00 REV 1> (drafted on 10 October 2000) extracted at *infoBASE Europe: European Database* <<http://www.ibeurope.com/Data/3617.html>> at 13 December 2000.

²¹ *Report*, above n 9, [11].

²² *Ibid* [26].

²³ *Ibid* [25].

Austria's refugee policy, the authors of the *Report* found that although there are issues relating to housing for asylum seekers and the high rates of detention, particularly for minors, the legal situation is comparable to that in other EU countries.²⁴ Similarly, Austria's immigration policy was found to show 'a commitment to common European values.'²⁵ Thus, in examining the rights of the three specific groups mentioned in the mandate, the authors of the *Report* judged Austria by its relative position compared with other European countries, rather than necessarily by absolute standards.

The section of the *Report* dealing with racism, anti-Semitism, discrimination and xenophobia (which indicates the Austrian Government's commitment to positive policies) is set against the 'ambiguous language'²⁶ used by some high-level members of the FPÖ. For instance, in 1993 the FPÖ was responsible for a referendum on the situation of foreigners in Austria, and in the campaign for the national elections in 1999 it used posters with the expression 'Stop Foreignisation' in Vienna.²⁷ Attention is also drawn to attempts by members of the FPÖ to prevent political opponents criticising the Government by the use of libel procedures.²⁸ The *Report* concludes that the FPÖ can still be characterised as a 'right wing populist party with extremist expressions'.²⁹ However, it also acknowledges that while in government the FPÖ supported a constitutional amendment concerning national minorities and the solution to the slave labour issue.³⁰

The *Report* recommends that the measures taken by the XIV EU members should be lifted, particularly as they could become counterproductive as a result of the nationalist sentiments that have been aroused in Austria.³¹ Subsequently, the XIV EU members agreed to lift the measures imposed upon Austria, despite continued concern about the nature of the FPÖ.³²

The *Report* is interesting for a number of reasons. First, it strongly articulates the notion of 'common European values'³³ and within those values highlights the fundamental importance of protection for the rights of minorities, immigrants and refugees, as well as the more traditional rights in the *ECHR*, such as freedom of expression. This is particularly important at a time when fears of extremist groups are growing in other countries in Europe, and serves as a warning that such groups will not be tolerated in government. Second, the *Report's* authors favoured the introduction of preventative and monitoring provisions into article 7

²⁴ Ibid [40].

²⁵ Ibid [51].

²⁶ Ibid [64].

²⁷ Ibid [80]–[81].

²⁸ Ibid [97]–[100].

²⁹ Ibid [106].

³⁰ Ibid [105].

³¹ Ibid [116].

³² *Communique of the XIV After the Report of The Three "Wise Men" on the Situation in Austria* (trans), 12 September 2000 <<http://www.bmaa.gv.at/oesterreich/index.html.en>> at 12 December 2000.

³³ *Report*, above n 9, [1].

of the *TEU* to monitor and evaluate the performance of member states with respect to common European values.³⁴ While the prospect of monitoring human rights records is not in itself unusual within the practice of international institutions, the possibility of suspending a member for human rights violations adds weight to this commitment.

The action taken by the XIV EU members in relation to Austria fell short of formal suspension pursuant to article 7. Excluding an existing member state from the benefits of membership is more controversial in international institutional law than imposing admission criteria, as it involves sanctioning behaviour that is considered adverse to an organisation's aims. The practice of other international organisations in suspending members for violating human rights standards is unclear. In recent years, the Commonwealth has suspended Nigeria, Fiji and Pakistan from the benefits of full membership, as a result of military coups and serious breaches of the association's fundamental principles.³⁵ It has been suggested that Russia's credentials in the Council of Europe should be reviewed, due to its continuing practice of capital punishment in violation of its obligation to abolish the death penalty.³⁶ The ability of the threat of exclusion to compel compliance with an international organisation's rules is directly proportional to the benefits to be gained from membership. Given that the benefits of EU membership are considerable, the threat of suspension is an important weapon in the fight to protect human rights.

Philip Alston and Joseph Weiler have commented that the 'human rights policies of the EU are beset by a paradox'.³⁷ Although the EU defends human rights in both its internal and external affairs, 'it lacks a comprehensive or coherent policy at either level'.³⁸ If the EU is to follow a similar path to the Commonwealth, it will need to develop a comprehensive list of standards upon which members may be monitored, so that decisions to suspend members are transparent. The adoption of articles 6 and 7 of the *TEU*, and the *Draft Charter of Fundamental Rights of the EU*, demonstrate that the EU will be more active in this process of standard-setting. However, it remains to be seen which rights will

³⁴ *Report*, above n 9, [117].

³⁵ Nigeria was suspended from Commonwealth membership as a consequence of 'serious violations of the principles set out in the Harare Commonwealth Declaration', *Auckland Communique* (1995) [10] <<http://www.dfaitmaeci.gc.ca/english/foreignp/commonwealth/cmnwelth.htm#10>> at 10 December 2000. Pakistan and Fiji were suspended from the councils of the Commonwealth in 1999 and 2000 respectively, following unconstitutional changes in government: *Durban Communique* (1999) [18] <http://www.dfait-maeci.gc.ca/english/foreignp/common/Communique_de_Durban-e.htm> at 10 December 2000; *Concluding Statement of the Special Meeting of the Commonwealth Ministerial Action Group on the Harare Declaration*, 6 June 2000, [2] <<http://www.thecommonwealth.org/html/info/info/press/0048.htm>> at 10 December 2000.

³⁶ For a discussion of this issue see, Khadine Ritter, 'The Russian Death Penalty Dilemma: Square Pegs and Round Holes' (2000) 32 *Case Western Reserve Journal of International Law* 129, 131.

³⁷ Philip Alston and Joseph Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (1999) 6.

³⁸ *Ibid.*

be given precedence when monitoring members' records for the purposes of article 7 of the *TEU*. The fact that the XIV EU members immediately announced the implementation of sanctions and delivered a mandate to produce the *Report* indicates that human rights standards will be monitored, implemented and possibly enforced among the EU membership in the future.