

These days, when we seek the more modest aim of “punching above our weight”, it is not surprising that voices are raised in favour of subjecting the mighty powers under the prerogative to some modicum of accountability: if the object of the powers is to promote the public good and the public good does not require putting the fear of God into our neighbours, the sacrifice of a little efficiency for a little accountability ought to be possible. As to whether the Procedure Committee’s recommendations will be seen as “sensible modernisation” when looked at from King Charles Street, we shall have to wait for the government’s response. The Chairman of the Defence Committee was scarcely encouraging when he had earlier told the Procedure Committee that he interpreted the asserted neutrality of the FCO to the reform of the treaty process when it submitted its evidence to the Royal Commission on the Reform of the House of Lords:

as saying to us be very careful, do not try to trespass into areas which will have time and resource and constitutional implications.⁴⁸

Any conflict about the power of Parliament would be reduced if its scrutiny role becomes a technical rather than a policy one, which is what the Royal Commission envisages. It will likely be necessary for further reform of the institutions of government before a final balance between efficacy and control of the treaty process is reached. Nonetheless, these recent developments suggest that the first tentative steps to open up the process are being taken. Other small steps would help—a more consistent technique in the drafting of legislation which implements treaties, a more disciplined approach by the courts to unimplemented treaties, a more engaged attitude by parliamentary committees. Until there is a more thorough-going look at our constitutional arrangements, it would be optimistic to expect anything more because the relationship between government and the House of Commons is at the heart of the debate. But, in the way of constitutional development in this country, it might be unwise to underestimate the ultimate consequences of the apparently minor innovations described above in combination on the development of subsequent practice on the making and implementing of treaties.

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II. FOURTEEN AGAINST ONE: THE EU MEMBER STATES’ RESPONSE TO FREEDOM PARTY PARTICIPATION IN THE AUSTRIAN GOVERNMENT

I

The participation of the Freedom Party in the Austrian government has given rise to exceptional reactions both in Austria and internationally. The imposition of a freeze in bilateral diplomatic relations by Austria’s European Union partners has been particularly notable, amounting to an unprecedented response to the election of a new government in another Member State. This note seeks to

48. “Evidence”, above n.13, qu.87.

describe the development of events and assess the status of the 14 Member States' actions under international law, in particular in the light of any developing norms concerning non-intervention, respect for human rights and the right to democratic governance.

II

At the time of the 1999 general election, Austria had been ruled by the Social Democrat Party, governing either alone or in coalition, for almost thirty years. Before the election, the Social Democrats governed in coalition with the Austrian People's Party as their junior partner. Victor Klima, the leader of the Social Democratic Party, held the chancellorship, whilst the leader of the People's Party, Wolfgang Schüssel, was foreign minister.

On 3 October 1999 elections to the lower chamber of the Austrian parliament (the *Nationalrat*) took place. The Social Democrats received the greatest number of votes, some 33.2 per cent of the total, gaining 65 seats. However, the election also saw a dramatic increase in support for the Austrian Freedom Party, which overtook the People's Party, if only by a few thousand votes, to become the second most popular political party in the country. The Freedom Party and the People's Party each gained some 26.9 per cent of the vote and took 52 seats. As no party had an absolute majority in the 183 seat chamber, the Austrian president, Thomas Klestil, asked Chancellor Klima, as leader of the largest party, to form a government. Klima first attempted to renew the coalition with the People's Party and then, when his efforts, after extensive negotiations, met with failure, tried to form a minority government. This attempt was similarly unsuccessful and on 21 January 2000 Klima formally announced that he was unable to form a government.

Following this announcement, on 25 January 2000 negotiations began between the People's Party and the Freedom Party on the formation of a joint government. On 1 February agreement was reached between the two parties. The coalition was reluctantly approved by President Klestil on 3 February and the new government sworn in on 5 February. The chancellorship was taken by the leader of the People's Party, Wolfgang Schüssel, with the leader of the Freedom Party, Jörg Haider, playing no role in the government. However, the Freedom Party MP Susanne Riess-Passer took the post of deputy chancellor and the Freedom Party gained control of six out of 10 ministries, including defence, finance, social affairs and justice. As a condition of his approval of the coalition, President Klestil insisted that the two party leaders issue a declaration stressing their commitment to democracy and human rights.¹

So far, one might see such manoeuvres as the normal working out of the democratic process under an electoral system based upon proportional representation. The Freedom Party is, however, a right wing, populist party, whose activists have often been accused of Nazi sympathies and much of whose support derives from its anti-immigrant policies. Its leader, Jörg Haider, prime minister of the Austrian province of Carinthia, has been a frequent subject of controversy.

1. For a French-language summary of the principal points of the declaration, see "Notre pays endosse sa responsabilité pour les pages sombres de son passé", *Le Monde*, 5 Feb. 2000.

He has described Nazi concentration camps as “punishment centres”, praised Hitler’s “orderly employment policies” and referred to Waffen SS veterans as “decent men of character”. He has stated that immigration into Austria has led to “over-foreignisation” (*Überfremdung*) and that the Austrian welfare state coddles immigrants and encourages them to have large families, leading to the degeneration of the Austrian nation.² The Freedom Party opposed Austria’s entry into the European Union, remains extremely critical of the European institutions and is opposed to any enlargement eastwards.

Similar parties exist across Europe, but the presence of such sentiments in Austria gives rise to particular sensitivities. Although Austria was officially declared the first victim of Nazi aggression by the Allied Powers, the majority of Austrians welcomed the 1938 *Anschluss* and their incorporation into the German Reich. Many prominent Nazis were of Austrian origin (most notably, Hitler himself). Observers have seen a failure by Austrians to admit their collaboration with the Nazi regime, a failure exacerbated by the victimhood conferred on them by the Allies and epitomised by their election in 1985 of Kurt Waldheim as their president, despite allegations of his complicity in Nazi atrocities in the Balkans.

As a consequence of such perceptions, the gains made by the Freedom Party and the possibility of its entering into government gave rise to widespread unease. As early as 7 October 1999 the Israeli foreign minister, David Levy, stated that his country would reconsider its relations with Austria if the Freedom Party were to enter into government. A similar statement, reiterating the Israeli government’s position, was made by the justice minister, Yossi Beilin, on 25 January 2000, following the opening of negotiations between the People’s Party and the Freedom Party.

Also on 25 January, the Parliamentary Assembly of the Council of Europe passed a resolution registering its grave concern about growing support for extremist political parties in Europe.³ In an obvious nod in the direction of the Freedom Party, it stated that such parties—especially those of the extreme right—encouraged intolerance, xenophobia and racism and threatened the fundamental values of democratic societies. On 27 January, the French and Italian prime ministers expressed their concern about the prospect of the Freedom Party becoming part of a coalition government in Austria. Belgium requested an emergency meeting of EU foreign ministers. Most significantly, on 31 January the Portuguese prime minister and minister of foreign affairs notified their Austrian counterparts of a joint statement issued by them on behalf of the Heads of State and Government of the other 14 Member States of the European Union. (At the time Portugal held the Presidency of the EU.) The statement said that if a government was formed in Austria which included the Freedom Party:

- Governments of the XIV Member States will not promote or accept any bilateral official contacts at political level with an Austrian Government integrating the FPÖ;

2. See Tony Judt, “Tales from the Vienna Woods”, *The New York Review of Books*, 23 March 2000.

3. See Parliamentary Assembly press release, 25 Jan. 2000. Available from the Parliamentary Assembly’s website at <stars.coe.fr>.

- There will be no support in favour of Austrian candidates seeking positions in international organisations;
- Austrian Ambassadors in EU capitals will only be received at a technical level.⁴

The statement was adopted by a unanimous decision of the 14. In explanation of its adoption, Portuguese prime minister Antonio Guterres said:

If a party which has expressed xenophobic views and which doesn't abide by the essential values of the European family comes to power, naturally we won't be able to continue the same relations as in the past, however much we regret it.⁵

On 1 February 2000, the United States of America followed Israel and the 14 EU Member States, stating that it would have to review the range and depth of its ties with Austria if the Freedom Party entered into government there. On 3 February the European Parliament adopted a resolution welcoming the "timely political intent of the Portuguese Presidency in as far as it reiterates member states' common concern to defend common European values" and calling on the Council and Commission to monitor developments in Austria and be prepared to suspend any State in the event of a serious breach of the principles of freedom, democracy and respect for human rights.⁶

Following the swearing in of the new government in Vienna, the measures agreed by the EU Member States came into force.⁷ Israel withdrew its ambassador for an unlimited period and the United States recalled its ambassador "for consultations", although he returned to his post, with somewhat less publicity, some days later.

The European Commission did not, however, follow the lead of the Member States. Indeed, it appears that Romano Prodi, President of the Commission, was not consulted about the Member States' proposed actions but merely informed of their decision a few hours in advance of its promulgation. At an emergency meeting convened on 1 February 2000 to respond to the 14 Member States' decision, the Commissioners unanimously agreed to maintain working relations with the Austrian government unless and until it breached European treaty provisions on human rights. The Commission indicated, however, that it would rigorously scrutinise Austrian legislation for conformity with the treaties. On 2 February, the President of the Commission added to this statement, declaring that "we [the Commission] will bear down heavily on even the slightest breach of the rights of individuals, or of any minority" by the Austrian government.⁸ The Commission's position was summed up in a statement by Chris Patten, the external affairs commissioner. He said that:

4. Statement from the Portuguese Presidency of the EU, 31 Jan. 2000.

5. Quoted in "EU threatens Austria over Haider's rise", *The Times*, 1 Feb. 2000.

6. See European Parliament, Daily Notebook, 3 Feb. 2000. Available from the European Parliament's website at <www.europarl.eu.int>.

7. In the United Kingdom's case, measures have included the cancellation of an official visit of the Prince of Wales to Vienna and the refusal of government ministers to meet with the Austrian foreign minister, Benita Ferrero-Waldner, on a visit by her to London.

8. Quoted in "Prodi pledges to punish any rights breach", *The Times*, 3 Feb. 2000.

What's happened in Austria in the last few days has been difficult for a number of member states, partly because of their historic memories and partly because of their nervousness about the consequences for their own political development of irresponsible populism.

So it's understandable that member states have acted as they have. But the EU is an organisation of rules and laws and treaties, and we in the Commission act as the guardian ... of that legal framework.⁹

It was originally thought that the freeze on bilateral relations between the 14 and Austria might also include the exclusion of Austrian ministers from the informal meetings of Member States' representatives which take place before meetings of the EU Council of Ministers and at which much EU business is effectively decided. Some Member States, in particular Belgium, pressed for such an exclusion, which, it was considered, might amount to Austria being squeezed out of the process of decision-making in the EU. However, on 7 February Portugal announced that Austria's new minister for social affairs, the Freedom Party MP Elisabeth Sickl, would be invited to the next informal meeting, in Lisbon on 11 February. The 14 had decided to maintain a clear distinction between bilateral and EU relations.

On 28 February 2000 Jörg Haider resigned as leader of the Freedom Party and was replaced by Susanne Riess-Passer. Haider, however, remained prime minister of Carinthia and most commentators considered that he would continue to direct the party from behind the scenes. Indeed, the 14 dismissed his resignation as a meaningless ploy and pledged to maintain their boycott. However, the months following the imposition of the freeze in bilateral relations saw the emergence of tensions between the 14 Member States. While Belgium and France argued forcefully for the measures' retention, Ireland, Italy, Finland, Denmark, and Greece all favoured ending the boycott. On 23 May, the Portuguese prime minister announced that he was consulting his fellow leaders on the issue. He stated, however, that just as a consensus between the 14 Member States had been necessary to impose the sanctions, so a consensus would be necessary to end them.¹⁰

Increasingly, as the Portuguese Presidency neared its end, pressure grew for a change in the 14's policy towards Austria. In particular, as Portugal's successor to the Presidency was France, one of the more hard-line of the 14, it was feared that unless agreement was reached before 1 July 2000 (the change-over date), nothing would happen for the next six months. Indeed, President Chirac stated that the sanctions would not be lifted during the French Presidency. The Austrian government also became more assertive. On 19 June, at the summit of EU Heads of Government at Feria, leaders of the Austrian coalition government warned that the sanctions imposed by the 14 could affect decisions both on EU constitutional reform and on the accession of new Member States. Also at the summit, Austria blocked the adoption of a directive on an EC withholding tax on savings, stating that it could not endorse the scheme for "constitutional reasons".¹¹

9. Quoted in "Haider minister asked to sup with the EU", *The Guardian*, 8 Feb. 2000.

10. See "Portuguese leader raises prospects of an end to EU sanctions against Austria", *The Guardian*, 24 May 2000.

11. See "EU losing race to end Austrian sanctions", *The Guardian*, 29 June 2000.

On 29 June, agreement was reached among the 14 on a plan drawn up by the Portuguese Presidency for a committee of three "wise men" to report on Austria's compliance with "common European values". The intention was that following the issuance of a report that Austria was complying with such standards, the sanctions would be lifted, probably at the beginning of 2001, when the Presidency passed from France to Sweden. However, though Chancellor Schüssel reluctantly agreed to the proposals, statements from the Freedom Party called them unacceptable.

On acceptance of the scheme, Portuguese prime minister Guterres wrote to the President of the European Court of Human Rights. The relevant part of the letter stated that:

The Prime Minister of Portugal received a mandate to ask the President of the European Court of Human Rights to appoint three personalities who would deliver, on the basis of a thorough examination, a report covering:

- the Austrian Government's commitment to the common European values, in particular concerning the rights of minorities, refugees and immigrants;
- the evolution of the political nature of the FPÖ.

Based on the conclusions of this report the XIV will re-examine their bilateral relations with the Austrian Government.¹²

On the same day, following discussions with Sr. Guterres, the President of the Court, Judge Wildhaber, accepted the role of appointor. On 12 July, the President announced his appointments. They were Martti Ahtisaari, former president of Finland, Professor Jochen Frowein, director of the Max Planck Institute for Comparative Public Law and International Law and former member and vice-president of the European Commission of Human Rights, and Marcelino Oreja, former Spanish minister for foreign affairs, former secretary general of the Council of Europe and former member of the European Commission.¹³

However, following a meeting of the coalition parties, on 5 July Chancellor Schüssel had announced plans for a national referendum on Austria's attitude to the EU. The referendum will consist of six questions. The first question will ask, "should the federal government . . . ensure by all means that the unfairly imposed sanctions on Austria be lifted immediately?" The subsequent questions ask about the future form the EU should take and whether it is fair that the larger EU States can override the will of the smaller.¹⁴ The referendum is to take place on 29 October or 26 November 2000. The Austrian government has stated, however, that the referendum will be abandoned if sanctions are lifted before it is held.

III

THE EU Member States' response to the Freedom Party's participation in the Austrian government gives rise to a number of issues and has been the subject of widely differing claims. Jörg Haider has denounced it as an illegal interference in

12. Reproduced in Registrar of the European Court of Human Rights, press release no. 491, 29 June 2000. Available from the Court's website at <www.echr.coe.int>.

13. Registrar of the European Court of Human Rights, press release no. 524, 12 July 2000. Available from the Court's website, *ibid*.

14. "Austria plays referendum card against EU partners", *The Guardian*, 5 July 2000.

Austria's internal affairs.¹⁵ Others have seen the 14's actions as required under some developing international consensus on democratic governance. It cannot be seriously doubted that the other EU Member States are entitled to concern themselves with human rights issues in Austria. Human rights are no longer a subject within a State's domestic jurisdiction. This is particularly the case in Europe¹⁶ and even more so among the Member States of the European Union.¹⁷ In addition to being parties to the Maastricht and Amsterdam Treaties, Austria and the other EU Member States are also members of the Council of Europe (and, as such, parties to its Statute and to the European Convention on Human Rights) and of the Organisation for Security and Cooperation in Europe. As OSCE members, they are all signatories to, amongst other things, the Helsinki Final Act, the Copenhagen Concluding Document, the Paris Charter for a New Europe and the Moscow Concluding Document.

Two elements of this "public law of Europe" can be highlighted. Firstly, what was unspoken earlier was made explicit in the Treaty on European Union: the EU is an organisation membership which is premised on adherence to democratic norms.¹⁸ The same commitment to democratic governance is required of members of the Council of Europe and of the OSCE. Adherence to Protocol No. 1 to the European Convention on Human Rights, which provides a right to free elections and to which all of the EU Member States are parties, is now required as a condition of joining the Council of Europe. Perhaps most interestingly, the Moscow Concluding Document contains a commitment by the OSCE States to support democratically elected governments against threats of overthrow by undemocratic means.

Secondly, there is an equally strong commitment (at least on paper) to combating racism, xenophobia and anti-semitism. In the sphere of the European Union, Article 29 TEU provides that one of the objectives of the new Europe is "the prevention and combating of racism and xenophobia in order to provide citizens with a high level of safety within an area of freedom, security and justice".¹⁹ A European Monitoring Centre for Racism and Xenophobia has been established, located, rather appropriately, in Vienna. Similar condemnations of

15. See also *The Times'* editorial of 29 June, which described the sanctions as "legally dubious". Leading article, "Out of the Hole", *The Times*, 29 June 2000.

16. See, for example, the preamble to the Concluding Document to the Moscow Meeting of the Human Dimension of the CSCE (1991) 30 I.L.M. 1670, which states that "the commitments undertaken in the field of the human dimension ... are matters of direct and legitimate concern to all participating States and do not belong inclusively to the internal affairs of the State concerned".

17. See Article 6(1) of the Treaty on European Union (Consolidated Version), which states that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law ...".

18. See Articles 6, 7 (on suspension) and 49 (on membership) of the Treaty on European Union.

19. Also see new Article 13, which provides that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on ... racial or ethnic origin, religion or belief".

“acts of racial, ethnic and religious hatred, anti-semitism, xenophobia and discrimination”²⁰ also appear in a number of OSCE documents.²¹

However, the objections made to Freedom Party participation in the Austrian government do not derive from what that government has done, but from what the Freedom party *is* and what its leaders have *said*. It has not been seriously alleged that the Austrian government has, under the influence of the Freedom Party, violated human rights in Austria, although plainly there is concern that it might do so in the future. Nor is the case one of whether the 14 Member States should recognise the new Austrian government. The issue whether to recognise a government only arises when one government replaces another by unconstitutional means.²² The Freedom Party has entered the Austrian government through the working of the democratic process.

Much has been written in recent years about the erosion of State sovereignty, the emergence of a right to democratic governance in international law and the existence of a right of humanitarian intervention when a people's rights are systematically violated.²³ The instant situation, however, presents somewhat of a paradox. Plainly the present Austrian government is a reflection of the choice of the Austrian people.²⁴ Consequently, international action to remove the government might be thought to be a violation of popular sovereignty. That choice, however, is seen by many as giving rise to a threat to human rights in Austria.

It has been suggested that there is an obligation on democracies in international law to ensure that they are not subverted by non-democratic actors, including the utilisation of “self-protective measures” such as prohibiting political parties from taking part in elections or even banning them completely.²⁵ Certainly, it appears that international law, in some circumstances, permits such measures.²⁶ However, there is little evidence that “the international community may protect the democratic entitlement whether or not a majority of citizens chooses to reject its

20. Pt. VI, Report of the Geneva CSCE Meeting of Experts on National Minorities (1991) 30 I.L.M. 1692 at p.1700, incorporated by reference into the Moscow Concluding Document, *op. cit.* at note 16.

21. See Guiding Principle VII, Helsinki Final Act (1975) 14 I.L.M. 1292; ch.IV, Copenhagen Concluding Document (1990) 29 I.L.M. 1305; ch.II, Moscow Concluding Document, *ibid.*

22. For discussion of this issue, see Sean D. Murphy, “Democratic Legitimacy and the Recognition of States and Governments” (1999) 48 I.C.L.Q. 545.

23. See, notably, W. Michael Reisman, “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 A.J.I.L. 866 and Thomas M. Franck, “The Emerging Right to Democratic Governance” (1992) 86 A.J.I.L. 46.

24. The parties forming the government obtained some 53.8% of the vote.

25. See Gregory H. Fox & Georg Nolte, “Intolerant Democracies” (1995) 36 Harvard I.L.J. 1.

26. See *M.A. v. Italy*, reproduced in 2 *Selected Decisions of the Human Rights Committee*, U.N. Doc. CCPR/C/OP/2 (1984) at p.31 (Human Rights Committee) and *KPD v. Germany* (1955-57) Y.B. E.C.H.R. 222 (European Commission of Human Rights).

democratic institutions."²⁷ Indeed, it has been suggested that such a rule would be highly undesirable.²⁸

Even if such rule did exist, it would seem inapplicable to the present case insofar as the Freedom Party does not appear to pose any threat to the Austrian democratic system. Austria in 2000 is not Weimar Germany in 1933. Haider has stated that he is solemnly committed to democracy²⁹ and there is no evidence that the Freedom Party intends to overthrow the existing political order. There is nothing to suggest that the well-established rule of non-intervention does not govern other States' responses to the Austrians' choice of government.

In the *Nicaragua* case, Nicaragua argued that the United States had violated the principle of non-intervention. The International Court of Justice accepted that the principle was a rule of customary international law and went on to state that:

A prohibited intervention must ... be one bearing on matters in which each State is permitted, by the principles of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.³⁰

Similar statements have been made, and continue to be made, by the political organs of the United Nations.³¹

Consequently, if the various actions taken by the other 14 Member States related to matters within Austria's domestic jurisdiction (as it appears that they did insofar as they related to the membership of the Austrian government), then they must be unlawful if they were coercive. What the 14 did, however, simply amounted to a number of actions which they would have been entitled to do regardless of the behaviour of the Austrian government. No State is obliged to maintain diplomatic relations with another State³² and the level and nature of diplomatic relations between States depends on mutual agreement. The other EU Member States acted wholly within their rights in freezing diplomatic relations

27. Foxe & Nolte, *op. cit.* note 25 at p.61.

28. See the responses to Fox and Nolte's article: Martti Koskenniemi, "'Intolerant Democracies': A Reaction" (1996) 37 *Harvard I.L.J.* 231 and Brad R. Roth, "Democratic Intolerance: Observations on Fox and Nolte" (1996) 37 *Harvard I.L.J.* 235. See also "Fox and Nolte Response" (1996) 37 *Harvard I.L.J.* 238.

29. *Op. cit.* note 1.

30. *Nicaragua v. USA (Merits)* I.C.J. Rep (1986), p. 108.

31. See, for example, G.A. Res. 2625(XXV) (1970) (the "Friendly Relations Declaration") and G.A. Res. 45/150 (1990), the example given by Roth, *op. cit.* note 28 at p.237, which states that international law precludes calling "into question each State's right freely to choose and develop its political, social, economic and cultural system, whether or not they conform to the preferences of other States". For commentary, see Brad R. Roth, *Governmental Illegitimacy in International Law*, Oxford, 1999.

32. See Article 2 of the Vienna Convention on Diplomatic Relations ("the establishment of diplomatic relations between States ... takes place by mutual consent"), which merely restates customary international law.

with Austria, as each State has a discretion as to what form its diplomatic relations with Austria might take.³³

This is not to say that a State cannot give up such a discretion. States bind themselves to co-operate with other States all the time. Indeed, the EU Member States have done so in various extremely far-reaching ways in the various European treaties. This, however, is why the 14 have been particularly concerned to distinguish between their bilateral relations with Austria (which have been the subject of the freeze) and their relations with Austria within the framework of the European Union (which have not).³⁴

Indeed, a parallel can be drawn with an element of the dispute between Nicaragua and the United States. Before the International Court of Justice, one of the ways in which Nicaragua alleged the USA had violated the US-Nicaragua Treaty of Friendship, Commerce and Navigation was by imposing an embargo on trade between the two States. The Court agreed, but also stated that in the absence of any treaty commitment or other specific legal obligation a trade embargo would not be in breach of international law because States had a choice whether or not to continue trading relations with other States, i.e. they had a discretion whether or not to do so.³⁵

Hence also the differences between the response of the 14 Member States and that of the Commission, which can only act within the European treaties. This is not to say that the Commission is powerless with regard to Member States' behaviour in the field of human rights. The Treaty on European Union provides a procedure for the suspension of membership rights as a result of serious and persistent human rights violations that may be initiated by the Commission (after obtaining the consent of the European Parliament) as well as by the Member States.³⁶ Discussion of this procedure is, however, outside the scope of this article.

IV

A perhaps rather unsatisfactory conclusion is, consequently, arrived at, that the 14 Member States' actions are neither illegal nor obligatory. Rather, they are within the scope of a discretion enjoyed by States under international law.

Such a view is, however, perhaps too narrow. What the episode shows is the 14 Member States using what legal means they had at their disposal (that is, the right

33. Although there are indications that the other Member States have been concerned not to be seen as intervening in Austria's internal affairs in any coercive way in their failure to state conditions for the resumption of normal diplomatic relations. See the interview on BBC radio described by Tony Judt when a Portuguese spokesman stated that the 14 were not seeking a change in government in Vienna, as that was an internal Austrian affair, but that the measures would be maintained for "as long as the situation continues". *Op. cit.* note 2.

34. Indeed, had the 14 barred Austrian representatives from informal meetings of the EU governments, it might have been argued that, by effectively excluding Austria from the decision-making process, they were acting contrary to the requirement that they perform their treaty obligations in good faith. See Article 26 of the Vienna Convention on the Law of Treaties.

35. *Op. cit.* note 30, at p.128.

36. See Manfred Nowak, "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU", in Philip Alston (ed.), *The EU and Human Rights*, Oxford, 1999.

of retaliation) to attempt to enforce normative standards which, it has been argued, constitute a new European public order³⁷ in which the views of groups such as the Freedom Party are considered unacceptable. There is undoubtedly an element of double standards in this process,³⁸ but this should not blind us to its potential significance. To an extent, the legitimacy of governments in Europe is beginning to be judged by international norms which look beyond whether procedural democratic standards are complied with. However, in such cases a distinction remains to be made between legitimacy and legality.

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37. See, in the context of the OSCE, Thomas Buergenthal, "The CSCE Rights System" (1991) 25 *Geo. Wash. J. Int'l L. & Econ.* 333, at 381.

38. It appears that when the German chancellor, Gerhard Schröder, suggested that Italy might incur similar ostracism should the "post-Fascist" National Alliance enter government, the Italian prime minister, Massimo D'Alema, instructed his embassy in Berlin to make diplomatic representations to the German chancellery. See Judt, *op. cit.* note 2.

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