THE HAIDER AFFAIR, LAW AND EUROPEAN INTEGRATION

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1. INTRODUCTION

In one sense, the measures taken by the other fourteen EU Member States against Austria amounted to very little - no casualties, no destroyed property, no interrupted commerce. Still, these actions, quite insignificant from the perspective of the everyday life of the man on the street, attracted more attention around Europe, and around the world, than contemporary events where the dead were counted in hundreds or thousands. Evidently they must mean something.

After a presentation of the facts, this article will deal with the public international law aspects (Wrangé) and the EU law aspects (Cramér), and then speculate about the consequence of this affair for the development of international and European legal and political discourse (Wrangé and Cramér). At the end, the two authors will attempt to draw some conclusions.

2. THE FACTS

In the elections to the Austrian Parliament in October 1999, Jörg Haider's Freedom Party (FPÖ) captured 27 % of the votes, making it the second largest party; the conservatives (ÖVP) and the Social Democrats (SPÖ) received 27% and 33%, respectively. The FPÖ, usually labelled a rightist populist party, had a history of xenophobic propaganda and there were also, dating a few years back, statements from its leader Jörg Haider which put the democratic character of the party in serious doubt.

After the elections, ÖVP and SPÖ tried to negotiate a continuation of their government, but negotiations to agree on a budget proved difficult. At the end

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of January, while many world leaders were assembled in Stockholm for the Holocaust Conference,¹ it became clear that the ÖVP was negotiating also with the FPÖ, and that the two parties were quite close to reaching an agreement to form a new government. On Monday 31 January, the Portuguese Prime Minister Guterres stated on behalf of the fourteen member states other than Austria (the XIV) that if a Government including FPÖ were to be formed,

- the XIV, “will not promote or accept any bilateral official contacts at political level with an Austrian Government integrating the FPÖ”;

- “there will be no support in favor of Austrian candidates seeking positions in international organizations”;

- “Austrian Ambassadors in EU capitals will only be received at a technical level.” It was also reported that it had already been made clear that “there would be no business as usual in bilateral relations with a government integrating the FPÖ.”²

Despite this message, the new coalition government took form, and was sworn in on Friday 4 February 2000. The political leadership in Austria seems to have been quite aware of the political prize of forming a coalition government including the FPÖ. This price had to be weighed, though, against the cost of departing from the constitutional principles of parliamentary democracy. The Austrian president Thomas Klestil declared, just before approving the new government: “If I have to approve this government, I won’t do so out of personal conviction, because I fear that Austria will suffer internationally”. However, he continued, “[i]n a democracy, a parliamentary majority must be respected. Personal sensitivities do not count”.³ As a precautionary measure, President Klestil withheld his approval until the leaders of the ÖVP and FPÖ had signed a document pledging to uphold democratic values.

In this declaration, issued on 3 February and also included in the Program of the coalition government, it was stated:

“The Federal Government reaffirms its unswerving adherence to the spiritual values which are the common heritage of the peoples of Europe and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy...

The Federal Government works for an Austria in which xenophobia, anti-Semitism and racism have no place. It will take vigorous steps to counter every way of thinking which seeks to denigrate human beings, will actively combat the dissemination of such ideas and is committed to full respect for the rights and fundamental freedoms of people of any nationality – irrespective of the reason for their stay in Austria. It acknowledges its special responsibility as regards the respectful treatment of ethnic and religious minorities...

¹ The Stockholm International Forum on the Holocaust, www.holocaustforum.se.

² Bulletin Quotidien Europe, No. 7645, p 9.

³ “Austria announces new government”, UPI, February 8, 2000, p. 1008034u2195.

Austria accepts her responsibility arising out of the tragic history of the 20th century and the horrendous crimes of the National Socialist regime. Our Country is facing up to the dark sides of its past and to the deeds of all Austrians, good and evil, as its responsibility. Nationalism, dictatorship and intolerance brought war, xenophobia, bondage, racism and mass murder. The singularity of the crimes of the Holocaust which are without precedent in history are an exhortation to permanent alertness against all forms of dictatorship and totalitarianism.

The European Union's project for a broad, democratic and prosperous Europe, to which the Federal Government is unconditionally committed, is the best guarantee against a repetition of this darkest chapter of Austrian history.

The Federal Government is committed to a self-scrutiny of the National Social past. It will ensure unreserved clarification, exposure of the structures of injustice, and the transmission of knowledge to coming generations as a warning for the future.”⁴

Later the same day, 4 February, the Portuguese Prime Minister informed that the anticipated actions announced a few days earlier by the XIV would take effect. In a statement, made at a press meeting in Gaza, February 3, the German Defence Minister Rudolph Scharping gave a concrete expression of the objective. Scharping declared that neither Germany nor Europe would ever accept a party such as the FPÖ to be in a European government. He continued by stating, with specific address to the Austrian situation, that “Germany and European institutions have a very clear position, where we don't accept a right-wing radical party in Austria. I hope that this mistake will be corrected in a short time”.⁵

Thus, Austria was the primary target, but the action by the XIV also included a general message ostracising all national right wing populist parties within present and future Member States of the European Union.⁶ This message, that right-wing populist parties would never be accepted as holders of government power, disregarding their popular support, had a clear address to the electorates in several Member States. Thus it is not surprising that the Member States that were most eager to take action were France and Belgium, where national right-wing populist parties have gained substantial popular support during the 1990's. Some other states among the XIV were more hesitant.⁷ By taking its coordinated actions against Austria, the XIV also sent a similar message to the applicant states currently negotiating for Union membership.

⁴ “Coalition Program; Declaration Responsibility for Austria - A Future in the Heart of Europe” <http://www.austria.gv.at/e/bundesreg/Regproge.pdf>

⁵ “Strong reaction to Austrian government”, UPI, February 9, 2000, p. 1008035u3371.

⁶ Compare the statement by the Portuguese Secretary of State for European Affairs Francisco Seixas da Costa at a plenary session of the European Parliament on 2 February: “What is valid for Austria today will be valid for any other country of the Union tomorrow. I repeat, what is valid for Austria today will be valid tomorrow for any other country of the Union”, Bulletin Quotidien Europe no 7647, p. 3.

⁷ Denmark for example, called for the discontinuation of the measures already by the beginning of February. Bulletin Quotidien Europe no 7653, p. 6.

States outside the Union took varied attitudes towards Austria. Israel recalled its ambassador, while the US called its ambassador home for consultations.

However, very soon critical voices were raised by a number of different actors: The measures by the XIV were met with negative reactions in most candidate states, with the important exception of Turkey.⁸ In non-governmental circles in the Union's Member States the action was almost unanimously questioned. It should in this connection be observed that the governments of the XIV, with the exception of Spain, were dominated by, or included, social democrats and that in many of these states the national conservative opposition took a critical or non-supportive position to the action.⁹ Strangely enough very few commentaries have been heard from academic circles.¹⁰

In concrete terms the criticism against the action of the XIV may be divided into a number of different interconnected lines of argument:

1. *Fanning right wing populism*: This line of criticism concerns the central concrete objective of the action, i.e. to counteract right-wing populism in Europe. According to this argument, the action was inefficient, or even counterproductive. Several commentators held that the message conveyed to the Austrian voters by the XIV could easily be interpreted as "you have made an unacceptable choice", and it was felt that the ostracism would make the FPÖ even stronger;
2. *Weakening the position of the supranational European institutions*: By acting outside the framework of the Union, thus side-stepping the Commission and the European Parliament, the XIV, intentionally or incidentally, weakened the position of the common institutions and thereby also the Union structure;
3. *Unacceptable disrespect for the democratic process*: It was not right to interfere in the democratic process of another country. This line of argument was implicitly based on the legal principle of non-intervention.
4. *Weakening of the general support for European integration*: The action could lead to a decrease in the general public support for the integration process in present as well as future Member States;
5. *There was no viable exit provided*: Once the measures were initiated, the XIV lacked a viable strategy to set the conditions for the termination of the action;

⁸ See for example the comment by Vaclav Klaus, chairman of Parliament in the Czech Republic: "I don't like Haider's policies, but he got a lot of votes in a democratic election. If the EU gets involved like this, it could easily make matters worse" as quoted in "Austria: Is the European Union Fanning Right-Wing Flames?", *Business Week*, February 14, 2000, p. 66.

⁹ See e.g. the criticism by the Swedish conservative party expressed at the deliberations of the Parliamentary EU-committee, EU-nämndens protokoll 1999/2000:20, anf 63-71.

¹⁰ One interesting exception being Nergélius, Joakim: "Att missbruka europaintegrationens värden – Om varför EU:s österrikebojkott är förfelad", *ERT* 2000, pp. 369-375.

6. *The action set a potentially problematic precedent:* Due to the dynamic political relations within the Union, most importantly between larger and smaller Member States, a general application of actions like the one undertaken by the XIV would not be possible in similar future situations.

All these six strains of criticism will be touched upon in the following analysis. The two last mentioned will be developed more fully in section 4 below.

The Austrian Government did not sit idle. It opposed the measures by claiming that they were unwarranted because the Austrian Government had no intention of taking any action that could transgress human rights. Representatives of the Government repeatedly declared Austria's abidance to the fundamental values of the Union and demanded that the country should be judged on basis of its factual performance. On 1 May 2000, Jörg Haider resigned from the presidency of the FPÖ.¹¹

The Government also went on a counter-offensive. In various fora, both within the Union and in other organisations where the EU-countries were co-operating and co-ordinating, like the United Nations, Austria threatened, in more or less explicit words, to cripple the Union's activities.¹² Simultaneously the Austrian government also produced constructive initiatives of a general character for the future handling of similar situations. Already at the Lisbon European Council, 23-24 March, Austria informally presented an idea for an amendment to the TEU establishing a precautionary monitoring mechanism in order to further the Member State's abidance to the fundamental values of the Union.¹³

During the first week in May, the Schüssel government announced an action plan with the objective to force the XIV to lift their measures. The plan included a number of different concrete measures in the field of offensive diplomacy and public relations campaigns. In addition it was announced that a referendum to confirm membership of the Union and the demand for the rejection of "sanctions" would be held the upcoming fall if no concrete plan to lift the "sanctions" had been presented before the end of the Portuguese Presidency.¹⁴

This was followed up on 4 July, when the Austrian Chancellor Schüssel announced that the Government intended to hold an advisory referendum in 20 October or 26 November regarding the "sanctions", if they had not been repealed by then. According to the plans, the electorate were to take a stand on

¹¹ Die Presse, 2 May, 2000.

¹² Of course, the possibility of a failure at the Intergovernmental Conference, which lead to the Treaty of Nice loomed large. For a concrete example of Austrian threats to block the IGC see Bulletin Quotidien Europe no 7705, p. 6.

It should be noted that work within the Organization for Co-operation and Security in Europe (OSCE) - where Austria held the Chairmanship in 2000 - was not affected.

¹³ Bulletin Quotidien Europe no 7698, p. 3

¹⁴ Bulletin Quotidien Europe no 7712, p. 7

six different issues in one single question. Some of these were not directly related to the Haider affair, but would have given the Austrian Government a popular mandate to act within the Union in a way that might have been viewed unfavourable by some other member states, such as guarantees against the dominance of a few large states. The most interesting questions from the perspective of this article were:

- instant repeal by the other member states of the “sanctions”;
- ensurance of the basic right of every country to form a government on the basis of democratic elections and respect for the right of all democratic parties to compete with one another, as well as the instruments of direct democracy;
- incorporation of a legal mechanism with possibilities of judicial/legal review of alleged violations of the union’s basic values as set out in the treaties.¹⁵

On 29 June - i.e., five days prior to the Austrian declaration on a referendum - the XIV declared in two different press statements, firstly that the measures were still in force, and secondly that the Portuguese Prime Minister had asked the President of the European Court of Human Rights, Luzius Wildhaber, to appoint three “wise men”, who would be given the task to

“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.”

In the letter to Wildhaber, the Portuguese Prime Minister had also indicated that “[b]ased on the conclusions of the report the XIV will re-examine their bilateral relations with the Austrian Government.”¹⁶

On the 12th of July, President Wildhaber announced that he had chosen Martti Ahtisaari, former President of Finland, Jochen Frowein, professor of international law and former Vice-President of the European Commission of Human Rights, and Marcelino Oreja, former Spanish Minister of Foreign Affairs, and a former member of the European Commission. After having interviewed and met with a great number and a wide spectrum of people in Austria – though not including Jörg Haider himself – the three wise men on 8 September adopted and presented their report¹⁷ to the French President Chirac - France then holding the Presidency of the European Union, and incidentally also being one of the staunchest supporter of the measures against Austria.

The report's evaluation was based on a number of legally binding documents, enshrining the positive obligations of European States to protect and promote human rights and fundamental freedoms. These included the fundamental principles of the European Union laid down in TEU, article 6(1), the

¹⁵ Die Presse, 5 July, 2000.

¹⁶ Regarding the events on 28 June, see Die Presse, 29 June, 2000.

¹⁷ “Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja” adopted in Paris 8 September 2000.

European Convention on Human Rights and Fundamental Freedoms,¹⁸ the Framework Convention for the Protection of National Minorities¹⁹ and the Convention relating to the Status of Refugees.²⁰ In addition, the 1986 Joint Declaration against Racism and Xenophobia²¹ was taken into account.²²

The report concluded in this part that the Austrian government “is committed to the common European values”. It continued by stating that the legal situation in the investigated areas was “well up to the standards applied in other EU Member States”. The authors furthermore established that in “some areas, particularly concerning the rights of national minorities, Austrian standards can be considered to be higher than those applied in many other EU countries”.²³ A special emphasis was given to the importance of the declaration made by the coalition parties of 3 February 2000.²⁴ It was in this connection stated that the “specific activities continued or introduced by the new Austrian Government to combat racism, xenophobia and anti-Semitism show that in this field the Austrian Government is aware of the specific problems existing in the country”.²⁵

This evaluation of the concrete situation in Austria might be construed to convey a message that the criticism of FPÖ had been unfounded. However, the risk for such an interpretation was largely balanced out by the second part of the report: On the basis of an inventory of FPÖ:s pronouncements and concrete actions on the Austrian political scene the authors confirmed that the party, also after it joined the Federal Government, continued to fit the description of a “right wing populist party with extremist expressions”. It was furthermore stated that “[t]his must give rise to concern since Governments are the organs of the European states which have the direct responsibility to implement their positive obligations concerning the protection and promotion of human rights, democracy, and the suppression of any kind of ethnic or racial discrimination”.²⁶ The report also recognised that the FPÖ in its campaigns had exploited and reinforced xenophobic sentiments and thus created an atmosphere “in which openly expressed remarks against foreigners became acceptable”.²⁷ Against this backdrop, the report formulated a warning for the future development, questioning the long-term credibility of the FPÖ: “In contradiction with

¹⁸ November 4 1950, ETS 5.

¹⁹ February 1 1995, ETS 157.

²⁰ July 28 1951, 189 UNTS 137.

²¹ Joint declaration by the European Parliament, the Council, the Representatives of the Member States meeting within the Council and the Commission, OJ C 158, 1986, p. 1.

²² “Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja”, paras 2–4.

²³ “Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja”, para 108.

²⁴ See p 29 above.

²⁵ “Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja”, para 109.

²⁶ “Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja”, para 92.

²⁷ “Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja”, para 110.

the past FPÖ behaviour and statements made by other FPÖ officials, the Ministers of the FPÖ have by and large worked according to the Government's commitments in carrying out their governmental activities so far. *It is not excluded that with the passing of time new directions within the party may emerge. Whether this will happen remains to be seen*".²⁸

Finally the report included a very brief evaluation of the action taken by the XIV. In doing this, the three authors declined to make any analysis of the lawfulness of the action, as this was not considered to be covered by the mandate given to them.²⁹ From a political perspective they were of the opinion that the action taken by the XIV had heightened the "awareness of the importance of the common European values, not only in Austria but also in other Member States. There is no doubt that in the case of Austria the measures taken by the XIV have intensified the efforts by the Austrian Government. They have also energized the civil society to defend these values".³⁰

Thus, the authors could see positive political results coming out of the action by the XIV. They furthermore carefully avoided giving any criticism regarding the past. Nevertheless, the critical voices, accounted for above, were echoed in the future tense, as it were. The report explicitly stated that "[i]t is our opinion, however, that the measures taken by the XIV Member States, if continued, would be counterproductive and should therefore be ended. The measures have already stirred up national feelings in the country, as they have in some cases been wrongly understood as sanctions against Austrian citizens".³¹

In sum, the three wise men found that there were serious concerns about the FPÖ, that the measures had had positive effect but that the continuation of the measures might be counterproductive. In doing this, the report also established a much-needed possibility for the XIV to exit, which was made use of 12 September when the measures against Austria were lifted.

Perhaps most importantly, the authors of the report formulated concrete recommendations to Member States concerning the future development of the European Union. These included a proposal for an amendment to article 7 of the TEU in order to establish a preventive monitoring system to evaluate the commitment and performance of individual Member States with respect to the Common European values. Such a system would have made it possible to treat a situation similar to the situation in Austria, within the Union structure from the outset.³²

²⁸ "Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja", para 113. Emphasis added by the authors.

²⁹ "Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja", para 114.

³⁰ "Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja", para 115.

³¹ "Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja", para 116.

³² "Report Marti Ahtisaari, Jochen Frowein, Marcelino Oreja", para 117. It should be noted that Austria already at the Lisbon Summit had presented an idea for the development of such a monitoring mechanism, Bulletin Quotidien Europe, no 7698, p.3.

3. THE HAIDER AFFAIR AND PUBLIC INTERNATIONAL LAW³³

Intervention in the domestic affairs of another state is illegal under international law. There is, however, no general agreement on what, exactly, intervention means. The issue is generally evaluated as concerns two parameters - purpose and means, the relation between the two being far from clear. Some means may be legal for all purposes, some means for some purposes, while other methods are almost always illegal, like the use of force. It should be noted already at this point, that although “intervention” is often taken to mean “military intervention” – such as in the discussion on so-called humanitarian (military) intervention –, in international law it can mean also dictatorial or coercive interference with other means.

The prohibition of intervention (the principle of non-intervention) is based on customary international law, but also on the UN Charter, which has three relevant provisions. According to article 2.1, the UN is based on the sovereign equality of states. Article 2.4 prohibits the threat or use of force against the political independence or territorial integrity of a state. Article 2.7 says that the UN shall not “intervene in matters which are essentially within the domestic jurisdiction of any state”. While article 2.4 on the use of force is inapplicable in this case, the concept of “sovereign equality” in 2.1 is relevant, but not easy to interpret. Article 2.7 is, according to its wording, nothing but a rule of competence for the UN; nevertheless, it contains the important reference to “matters which are essentially within the domestic jurisdiction of any state”, which is a vital part of any definition of illegal intervention. In the Friendly Relations Declaration, adopted by consensus by the UN General Assembly in 1970, the basic UN principles are explained further. Here it is stated that “[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State”.³⁴

3.1 The Purpose

So, as to the purpose, there is a reserved domain of domestic issues, where external actors may not intervene. The concept of reserved domain has, though, been interpreted differently over time. Two extreme views are possible. The one is that what happens on the inside of a state is never the concern of another states, unless, possibly, it affects this latter state - like a military expedition or

³³ This section is written by Pål Wrangé.

³⁴ UN GA RES 2625 (XXV).

environmental contamination originating in the territory of the former state.³⁵ This is the traditional view. The other extreme is the cosmopolitan view that we are all members of the same international community. It follows from this that the relation between a government and its subjects is not an exclusive matter for that government, but a common concern for everyone, and this includes practically all issues, including, of course, human rights.

The prevailing view is the middle-position that in general, states are free to act as concerns their domestic (internal) affairs, but that there are exceptions, and quite a few of them, which have been established in international law, be it in treaties or customary law. One generally accepted exception is the application of human rights. Hence, the reserved domain comprises matters which do not affect other states and which are not regulated by international law, and regarding such questions, a state cannot be held legally accountable.³⁶

But does that mean that another state has no right to try to influence matters within the reserved domain? And how does this apply regarding the formation of governments? Prior to the 1990's, this was generally not a legitimate concern of other states. There were exceptions, like when a government, which had been formed as the result of an act clearly illegal under international law, was not accepted to represent a state.³⁷ Examples include the Japanese puppet-regime in Manchuria in the 1930's and the racist Ian Smith regime after the Unilateral Declaration of Independence of then Rhodesia (now Zimbabwe) in 1965. In both of these cases, though, what was in question was primarily the legality of the state, and not that of the government, although the racist character of the Smith regime was clearly relevant.³⁸ A better example is the refusal to accept credentials from the Heng Samrin regime of Cambodia in the 1980's, partly because it was the result of an arguably illegal Vietnamese invasion of Cambodia/Kampuchea in 1978/1979. Here the state of Cambodia was never in question, but the legitimacy of its government was.

In the 1990's, the practice of international law took a new turn. There was a series of refusals by the international community to deal with regimes, which had come to power through unconstitutional means. Perhaps the best examples are Haiti in 1991-1994 and Sierra Leone in 1997-1998. In both cases, leaders of military juntas had overthrown democratically elected governments, and were generally regarded as illegal, other governments or international organisa-

³⁵ Another example might be when the national of a foreign state is effected, for instance by an expropriation or by police abuse; in this case it has been accepted since ancient times that there is a right of diplomatic protection.

³⁶ See Simma, Bruno (ed), *The Charter of the United Nations: A Commentary*, 1994, p 151.

³⁷ I have refrained from using the term "recognise", since there is no universal practice to recognise governments, in distinction to recognition of states. Despite that, states regularly have to take a stand on whether a government represents a state or not; for example, it has to be decided if a representative of a government is eligible to represent that state in the UN General Assembly.

³⁸ See UNSC RES 216, 12 November 1965.

tions refusing to accept them as representing their countries.³⁹ In 1999, the OAU (the Organization of African Unity) summit even decided not to admit representatives of states where the government had come to power by unconstitutional means,⁴⁰ and the OAS (the Organization of American States) had taken a similar decision in 1996. There are counterexamples, and examples of more hesitant reactions, but the fact remains that there definitely is a trend in this direction.

Hence, it seems like there is a putative rule of international law which says that a government is not accepted to represent a state if it has come into power by unconstitutional means, at least if the constitution is up to par with current standards of democracy.⁴¹

The issue of representativity is not identical with that of intervention because it can be argued that allegedly unrepresentative government isn't really acting on behalf of that state, and that hence that it cannot be shielded by the duty not to intervene in other state. Nevertheless, from the point of view of the target government, the situation is the same, because a refusal to accept a putative government will be perceived as an effort to influence the political process in that state. Hence, it now seems clear that it is accepted international practice to refuse to deal with unconstitutional governments, and to likewise refuse to consider such governments to represent a state. To what extent the unconstitutional status also may justify trade embargoes or other sanctions (or reprisals) is not clear, but it follows from the above that purely diplomatic countermeasures cannot be illegal merely because of their purpose, since diplomatic relations assume that both parties respect each other's representativity.

The Haider affair is different from that practice, though. In the Austrian case there has been no doubt as to the legality under international or constitutional law of the Government. Rather, the fear is that the Government would not respect certain values established among neighbouring democratic, liberal states. Does that make the measures taken against Austria illegal?

In my opinion not. States have tried to influence the democratic processes for the formation of Governments on other occasions, too. A recent and quite forceful example is when, on 19 September, 2000, the European Union issued a statement on the Federal Republic of Yugoslavia with the following words:

³⁹ Cf. e.g., UNSC RES 841, where sanctions are imposed against "the de facto authorities in Haiti", and UNSC RES 1132, where sanctions are imposed against "the military junta" in Sierra Leone.

⁴⁰ OAU is the Organisation of African Unity. The decision did not have retroactive effect.

⁴¹ See, i.a., Franck, Thomas M., "The Emerging Right to Democratic Governance", *American Journal of International Law*, vol 86, p 46, and Murphy, Sean D., "Democratic Legitimacy and the Recognition of States and Governments", *International and Comparative Law Quarterly*, vol 48, 1999, p 545.

The possible ethnic bias in the evaluation of constitutions is a separate issue, which will not be treated in this article.

“The elections ... will give the Serbian people the opportunity to repudiate clearly and peacefully the policy of Milosevic ...

We reaffirm that a choice leading to democratic change will entail a radical change in the European Union’s policy with regard to Serbia: we will lift the sanctions against the FRY; we will support the necessary economic and political reforms by providing Serbia with economic aid for its reconstruction and we will support the reintegration of the FRY into the international Community. We will suggest to the FRY that it draw closer to the European Union so that it can occupy its rightful place in Europe. We have never forgotten that the Serbs are Europeans....”⁴²

This is a clear attempt to influence an election in another state, and it involves measures which are much more intrusive than in the Austrian case. I have seen no comments to the effect that it was illegal.⁴³ There are other, similar examples. The case of Yugoslavia is, of course, not wholly analogous with that of Austria, since the purpose in the latter case was to influence the acts of state organs (the Government to be and the Nationalrat), while the declaration to Yugoslavia addressed the electorate, which is not a state organ.

But there are also many examples of how states try to influence acts of state organs within their “reserved domains”. Sweden and other members of the EU often make *démarches* to other governments concerning acts of state which are clearly legal, such as the exercise of the capital punishment, against which there is no general prohibition.

So, there are examples of how states try to influence the outcome of a democratic election, as well as examples of how states try to influence other acts within what used to be perceived as a reserved domain. Thus, not much - if anything - remains of this reserved domain, if this domain is a secluded area where foreign governments have no right to try to influence. (This does not mean that the concept of reserved domain is meaningless; it should be taken to mean that area of subject-matter, where a government – in spite of the fact that it has to accept legal measures showing criticism - is not *legally accountable* to other states.)

3.2 The Means

Nevertheless, the purpose is not the one and only criterion. We also have to examine the means.

A state may not intervene through coercive measures in order to affect the domestic policy of a state, as long as that latter state acts within the bounds of international law (respect for human rights, etc). Nor may it breach other legal

⁴² Press Release 1142/00, 19 September, 2000.

⁴³ There is no need to discuss here whether the EU sanctions against Yugoslavia, which the statement alludes to, were legal in the first place. It is my view that they were, but that analysis would require too much space.

obligations, such as trade agreements unless there is a just cause for that. These two issues are intertwined, and the relation between coercion and breach of an obligation is not clear.

We will start here with the issue of breach of obligations. Of course, it is in general illegal to breach an obligation, regardless of whether the act was a part of an intervention or not. However, sometimes there are justifications for a breach; the breach may be a reprisal, i.e. an act which in itself is illegal, but which becomes legal if it is a countermeasure against an illegal act of the target state. Reprisals are necessary in international law because of the lack of courts and executive authorities with mandatory jurisdiction, and they are thus legal means of self-help. A retorsion, by contrast, is an act which is also a countermeasure, but which is legal *per se*, such as abrogation of diplomatic relations; hence, a retorsion does not need to be justified as a reaction against a breach of law by the target state.⁴⁴

The measures against Austria cannot be labelled reprisals, because Austria had not breached international law. Therefore, if the measures were illegal *per se*, they could not have been justified. But were they illegal?

The first and the third measures are clearly permitted as such. There is no obligation to maintain diplomatic relations at any level at all, no rule in international law treaties which forces states to have contacts at a certain level. There are rules in the EU treaties and other international legal instruments which regulate the business of the EU institutions, including the Council of Ministers, but they are not affected by the actions of the XIV (see below).

The second measure, namely the decision to not support Austrian candidates regarding international positions, needs, however, to be discussed in some detail.

With regard to political positions, the measures are clearly appropriate. I am here referring to instances where Austria is a candidate as a state, or where the candidate, although a natural person, is relying on the goodwill of his country as a representative of that state, such as a diplomat running for the Presidency of the UN General Assembly. Here the political considerations - including the political colour of the government - always constitute an aspect of the decision (vote, etc). And it is also a clearly legitimate political interest of the government concerned to strive for the post.⁴⁵ With regard to purely professional positions in international organisations, it is another matter. Article 101.3 of the UN Charter provides that in the employment of UN staff, "the paramount consideration" shall be "the highest standard of efficiency, competence and integrity". One should therefore respect the non-political and professional integrity of

⁴⁴ Henkin, Louis, et al, *International Law: Cases and Materials*, 3 u, 1993, s 579.

⁴⁵ It is another matter that a state or an individual representing a state, in the exercise of the function to which it/he/she has been elected, has to take the interests of the organisations as a whole into account, in accordance with the relevant rules pertaining to that organisation.

the international service, and consequently, these officials should be employed only on their personal merits, however with consideration given to the geographical distribution.⁴⁶ To my knowledge, the measures were not applied in such situations, and if they had been, Austria would hardly have been the victim. The interests which article 103, and similar provisions for other organisations, are supposed to protect are not those of the home countries of these international civil servants, but the integrity and well-functioning of the organisations they have applied to serve. Hence, we may conclude that there has been no breach of obligation owed to Austria.

And further, if it had been the view of the Austrian government that the measures were in breach of international law, that would have been stated. In fact, except for one instance, the Austrian Government has made no such protests, public or bilateral;⁴⁷ instead, the Austrians have defended themselves on the substance. And the XIV seem to have made no effort to justify the actions from a legal point of view, which indicates that they did not find that the measures involved *prima facie* breaches of obligation to Austria. Therefore, reactions of states corroborate the view that these acts are not illegal *per se*.

Consequently, these measures could be subsumed under the heading of retorsion, i.e., counter-measures which are legal as such and therefore need no justification. They were used to express an amount of disapproval, like the US refusal to appoint an ambassador to Sweden after the then Prime Minister Olof Palme's condemnation of the US bombings of Hanoi during Christmas 1972. Neither of the parties - Austria and the XIV - breached an obligation, but both acted within their legal competence under public international law. For that reason, the term "sanctions" is not appropriate, either. Even though this term is not really a term of art in international law, it implies that an action is a countermeasure against some sort of illegal act.

Even though the measures were not breaches of obligations in a more limited sense, perhaps they could fall under the somewhat nebulous heading of coercive intervention. It should be noted here, that what we are dealing with is not just the measures as implemented, but also the threat of the action, which was expressed already during the negotiations for the Austrian government, with the clear intention of influencing this political process.

⁴⁶ See generally, Blokker, Niels M., and Schermers, Henry G., *International Institutional Law: Unity Within Diversity*, 3 ed, 1995, p 332-338. In spite of that, it is not a secret that states often take an interest in the careers of their nationals in international organisations. This might have various reasons: the post may be considered a reward for the person involved, the nationality may (but will not necessarily) bring a certain amount of good-will to the state, the person may influence the organisation in ways which might be useful for the state concerned, or she/he may provide an accessible channel of information for the home-state. All of these considerations are, however, to varying degrees in non-conformity with the nature of the international civil service.

⁴⁷ They have claimed, though, that the measures were in contravention of EU law. See *Bulletin Quotidien Europe*, no 7712, p. 7.

Intervention is an international pressure which is not justified by a norm of international law and which concerns the orientation of the discretionary competencies of the targeted state. It is the goal of the intervention to influence the other state in its reserved domain; the pressure has brought negative consequences for the target state, and the measures are beyond what is proportionate and reasonable.⁴⁸ To this author, it is unclear whether an act is prohibited merely because it corresponds to this description – which covers also acts which are not specifically prohibited – or whether the term “intervention” is nothing but a collective term for more specific types of acts which are prohibited under international law, such as financial support of armed bands. For instance, the ICJ found in the Nicaragua case that not even a trade embargo from the dominant regional economic country (the USA) constitutes intervention.⁴⁹

Diplomatic expressions of concern do not amount to intervention; only coercive or dictatorial acts count as such.⁵⁰ Other acts, which are generally accepted and do not constitute illegal intervention, are to put an item on the agenda of a UN organ, to discuss an issue, to adopt resolutions, and to engage in fact-finding and reporting on another state.⁵¹ Hence, and as already implied, it is not intervention in the domestic affairs of another state to present views on another states' domestic policy by normal diplomatic means, political statements, etc. Neither is it coercion to adopt resolutions in international organs, nor to refuse political contacts with a regime with which one does not sympathise.⁵²

It has been held that the measures as such were a legal act of retorsion, while the threats amounted to illegal intervention. Logically, that seems wrong; if an action is legal, then it cannot be illegal to announce in advance that one will take that course.

⁴⁸ Kranz, Jerzy, *Notion de souveraineté et le droit international*, *Archiv des Völkerrechts*, vol 30, 1992, p 411 at p 434.

⁴⁹ ICJ Reports, 1986, para 244–245.

⁵⁰ Jennings, Sir Robert, and Watts, Sir Arthur, eds, *Oppenheim's International Law*, 9 ed, 1992, p 432 and Donnelly, Jack, “State Sovereignty and International Intervention: The Case of Human Rights”, in Lyons, Gene M., *Beyond Westphalia? State sovereignty and International Intervention*, 1995, p 115 at p 119.

⁵¹ Simma, Bruno, ed, *The Charter of the United Nations: A Commentary*, 1994, p 150-151. In almost any resolution or presidential statement of the UN Security Council, for instance, one may read opinions of the Council which concern issues which are not regulated by international law, and which could therefore be considered to belong to the reserved domain. If such statements had been breaches of the principle of non-intervention in article 2.7, they could not have been explained by the exception in that article for action under chapter VII, because the vast majority of these resolutions and statements have been adopted under chapter VI.

⁵² ² Cf Jennings, Sir Robert, and Watts, Sir Arthur, eds, *Oppenheim's International Law*, 9 ed, 1992, p 432.

3.3 Conclusion under international law

Sovereignty means, on the inside of the state, exclusive jurisdiction, and on the outside the freedom to interact or not to interact with other states. The Austrians claimed that the XIV were interfering with Austrian internal sovereignty to choose whichever government should exercise its sovereign powers. The XIV, on the other hand, maintained that they were merely exercising their external sovereignties - their rights to decide with whom and when to have dealings. They were both exercising the privilege which is endowed upon states to do what is not expressly prohibited. What we have is, therefore, in a sense, a collision of liberties. If both sides were merely exercising their sovereignties, the Haider affair was beyond international law.⁵³

To answer the question whether the XIV were abusing their discretionary privilege to have or not have diplomatic relations in a way which amounted to intervention was a breach of international law, this was clearly not the case. Whether the measures could be perceived differently in the particular context of the European Union will be discussed in the next section by Per Cramér.

4. THE HAIDER AFFAIR AND EU LAW⁵⁴

It has to be underlined that when taking their co-ordinated bilateral measures against Austria the XIV acted outside the framework of the European Union. The Commission was not represented in the deliberations leading up to the action, neither was the European Parliament informed. From a technical point of view the action by the XIV had some similarities to the definition and execution of a Common Position⁵⁵ within the intergovernmental framework of the Common Foreign and Security Policy: A common declaratory statement that was concretely implemented by the participating states. The fundamental difference was that in this case the target of the action was to be found inside the territorial limits of the Union.

The XIV did however use the Union as an instrument to strengthen the legitimacy and impact of their action. Declaratory references were made to the common values of the European Union.⁵⁶ When pronouncing common state-

⁵³ And perhaps this could be taken even further. It is natural to look at the Haider affair as a possible precedent, and this article does so below. But there is also another possible interpretation, assuming that a different logic was at work - the logic of the decision, which not only is based on nothing, but which also establishes nothing. The gut reaction denies and defies the need to justify an action in generalisable terms. The XIV used a room in international law and EU law, they took a decision, and that is all there is to it. No legal questions asked, no legal questions answered, and no precedent created.

⁵⁴ This section is written by Per Cramér.

⁵⁵ TEU, article 15.

⁵⁶ See as example the argumentation by the Belgian Foreign Minister Louis Michel at the General Affairs Council 14 February, Bulletin Quotidien Europe, no 7655, p. 3.

ments the XIV were consequently represented by the Member State holding the presidency of the Union, initially Portugal and thereafter France. It should also be noted that the report of the “The Three Wise Men” was adopted in Paris before being presented to the French presidency.

As accounted for above, the co-ordinated bilateral actions taken by fourteen of the Member States against the fifteenth have a clear relevance under general Public International Law. In a regional perspective, the XIV as well as Austria are bound under the Treaty on European Union. It is therefore of central interest to analyse if the action by the XIV against Austria may constitute an infringement of their duties under the Treaty.

It should in this connection be noted that the Austrian government, when presenting its action plan the first week of May, maintained that the measures taken by the XIV constituted a violation of the legal foundations and the spirit of the EU Treaty. More specifically references were made to the right of a democratically elected government and the general duty of loyalty, co-operation and solidarity between Member States.⁵⁷ However, there seems to have been no indications that the measures concretely affected the functioning of the free internal market.

4.1 Did the XIV violate the Treaty on European Union?

In the following I have sketched out a number of possible lines for argumentation on the question of legality of the action taken by the XIV in the light of the TEU.

Initially it should be pointed out that the Treaty does not explicitly regulate the type of action taken by the XIV. Article 7 lays down rules for adopting a political decision on the determination of a Member State’s serious and persistent breach of the fundamental principles spelled out in article 6(1). Such a determination may be followed by a decision on suspension. However, in the present case no one maintained the existence of such a breach. The action by the XIV had a precautionary character with regard to an anticipated breach.⁵⁸

It could be questioned if the *concrete* measures taken against Austria, i.e. the toning down of diplomatic relations constituted a violation of Austria’s rights under the Treaty. The answer to this question is probably no. No clear Austrian rights under the Treaty were suspended, and Austria continued to have full for-

⁵⁷ The Austrian government based its argument on the TEU article 6 and the EC Treaty article 10, Bulletin Quotidien Europe, no 7712, p. 7.

⁵⁸ Compare statement by the Portuguese Secretary of State Seixas da Costa on behalf of the XIV 2 February, Bulletin Quotidien Europe, no 7647, p. 3.

mal access to the institutions and processes of the Union.⁵⁹ The measures were therefore not in breach of the letter of Union law.

However, it could be argued that they were in breach of the spirit of the EU treaties, which assume a confidential and trusting co-operation between the Member States, even outside the scope of the common institutions. It should also be noted that Austrian representatives to the Council were, at least initially, socially shunned by representatives from other Member States.⁶⁰ The capacity of Austria to function effectively in the EU was thereby to some extent hampered by the measures.

A second line of argumentation relates to the principle of mutual Constitutional respect between the Member States of the European Union:

It has never been doubted that the Austrian constitution fulfils the principles laid down in article 6(1) of the TEU. Furthermore, it seems clear that the formation of the coalition government was fully in compliance with national constitutional law. In addition, it has not been maintained by anyone that the Austrian coalition government has taken any form of concrete actions that could constitute a violation of the common principles enumerated in article 6(1).

Nevertheless the XIV based their action on the necessity to protect the common values on which the European Union is founded. *Prima facie* this problem could be said to translate into a tension between popular democracy and the safeguards for human rights and freedoms. However, this kind of tension is inherent to this set of principles. Democracy in the modern meaning, reflected in TEU article 6(1), requires safeguards for fundamental human rights and these safeguards establish limits to the exercise of democratic political power.

What is at stake in the case of the relations between Austria and the XIV is rather the Member States' constitutional sovereignty, or constitutional independence of other states. The retention of constitutional sovereignty may be seen as an implicit underlying principle for the structure of the European Union.⁶¹ From this principle follows a duty of mutual constitutional respect be-

⁵⁹ The XIV very carefully limited their action to *bilateral* relations whereas the Union framework was seen as a set of *specific rules*. On February 9 Portuguese Prime Minister Antonio Guterres declared that the measures should not affect the "normal working of organisations of multilateral kind", Bulletin Quotidien Europe, no 7652, p. 5.

⁶⁰ Within the EU institutions the measures were given concrete expression in quite absurd ways. The Weekly Magazine Europe reported in its issue March 2000, p. 4: "At the first meeting of EU ministers since Austria's new government was sworn in February 5, Social Minister Elisabeth Sickl, a member of the Freedom Party, was snubbed by her counterparts, and the French and Belgian ministers walked out of the room when she spoke. The traditional photograph also was cancelled because of Sickl's presence". For a report of another similar act of shunning see: Bulletin Quotidien Europe, no 7665.

⁶¹ Compare Rosas, Allan: "The Decline of Sovereignty: Legal Perspectives, in Iivonen, Jyrki, ed: "The Future of the Nation State in Europe", Edward Elgar Publishing Limited, Aldeshot 1993, pp. 130-158, at pp. 133-134.

tween the Member States and the Common institutions as well as between the Member States themselves⁶² *This duty is balanced by the duty to comply with the common principles of the Union, laid down in TEU article 6(1)*. Within the Union framework, an action against a Member State that has violated these principles could only be taken in accordance with TEU, article 7.

It could thus be argued that the XIV, by taking action with the object to limit the constitutional sovereignty of another Member State, have infringed the underlying principle of constitutional respect between the Member States of the Union. However, there exist strong counter arguments: Firstly it has to be recognised that the provisions in TEU, article 7 do not pre-empt precautionary measures as those taken by the XIV. Secondly, the duty of constitutional respect is hardly anything more than a regional reformulation of the general duty of non-intervention, conditioned by the duty to abide to the fundamental principles of the Union. The analysis of the action by the XIV in the light of the general principle of non-intervention given above is therefore applicable also to this regional perspective. In this connection it could furthermore be argued that the threshold for what is considered to be an illegitimate intervention within a regional bloc of states that participate in a common venture of integration would be higher than in the general international setting.

A third, closely connected, line of argumentation relates to the general duty of the Member States to act in loyalty with the objectives of the European Union. As stated above the action of the XIV constituted a number of co-ordinated bilateral actions taken outside the institutional framework of the Union.

Nevertheless, this action taken by fourteen Member States against the fifteenth had an acute relevance for the Union and thus it can be argued that the common institutions, most importantly the Commission, had a rightful interest to be involved in order to be able to fulfil its duties under the Treaty.⁶³ It could therefore be argued that the XIV, by taking action outside the structure set up by the TEU, have weakened the Union structure. Thus, they could be said to have infringed the fundamental duty of loyalty with regard to the attain-

⁶² The principle of constitutional respect is closely connected to the principle of constitutional tolerance, which Professor Joseph Weiler has dubbed to be *the ideological Grundnorm not only of European law, but of European integration as a whole*. Weiler views this principle as the major instrument for establishing an acceptance of European Law as the supreme law of the land in all Member States. In order to uphold this acceptance, all Member States must show tolerance to the constitutional systems of all other Member States as long as these abide to democratic principles. Weiler, Joseph: "The Function and Future of European Law", in Heiskanen, Veijo; Kulovesi, Kati ed: "Function and Future of European Law", Forum Juris/KATTI, Helsinki 1999, pp. 9-22, p. 11. Compare TEU, article 6(3) with address to the EU institutions: *The Union shall respect the national identities of its Member States*.

⁶³ Compare TEU, article 3: *The Union shall be served by a single institutional framework which shall ensure the consistency and continuity of the activities carried out in order to attain its objectives...*

ment of the Union's objectives.⁶⁴ However this argument hardly seems convincing. Neither the Commission, nor the Parliament viewed the action as such an collective infringement of EU-law. On the contrary, the European parliament, 3 February, adopted a Resolution in which it in express terms welcomed the action as an act of necessary heightened vigilance in order to defend European values.⁶⁵ Representatives of the Commission expressed an understanding for the action and did not distance themselves from the concerns underlying the action.⁶⁶ However, the Commission gave itself a distinct independent role of safeguarding the continued functioning of the Union: Romano Prodi stated 3 February that "[w]hen one of its members is in difficulty, the whole Union is in difficulty. It is the duty of a strong supranational institution not to isolate one of its members, but instead to keep it firmly in the fold". At the same instance Prodi underlined, with adress to Austria, that when a State becomes a member of the Union it "accepts its fundamental principles without reservation and forever".⁶⁷

To conclude, it follows from the sketchy outlines above that it is possible to argue that the XIV might have infringed duties under the EU law. These arguments are however not convincing and it follows from the characteristics of the present case that these Treaty based arguments could in reality only be voiced on the political arena;⁶⁸ though legal, the measures might still be politically illegitimate.

4.2. Two central legal-political implications of the action.

The measures taken by the XIV may be divided into two interrelated stages, before and after the formation of the coalition government on 4 February. The first stage of the action by the XIV was initiated as an ultimatum while the negotiations on the formation of a coalition government in Austria were ongoing. Its primary objective was undoubtedly to influence these negotiations so that the FPÖ would not be given the position of a government partner.

It seems probable that the XIV were quite sure of that the Austrian Conservative party – ÖVP – would be convinced that the political price for entering

⁶⁴ Compare EC Treaty, article 10.

⁶⁵ Bulletin Quotidien Europe, no 7648, p.3. The resolution was adopted by 366 votes to 103 with 45 abstentions.

⁶⁶ At a speech in Ottawa 8 February external relations Commissioner Chris Patten said that it was "understandable that the Member States have acted as they have", Bulletin Quotidien Europe, no 7651, p. 3. In a speech to the European Parliament 3 February Romano Prodi expressed that the Commission shared the concerns of the XIV, Bulletin Quotidien Europe, no 7647, p. 3.

⁶⁷ Bulletin Quotidien Europe, no 7647, p.3

⁶⁸ TEU, article 46.

into a coalition with the FPÖ would be of such a magnitude that it was prohibitive. When this desired result of the ultimatum was not attained, the diplomatic measures consequently had to be released. This second phase of the action was primarily addressed to the coalition government, demanding its resignation. The first stage of the action thus led to the second, as a result of a development outside the control of the XIV. This character of the action has given rise to the two interesting interrelated strains of criticism that deserve attention: The question of the action's value as a precedent and the problems related to the absence of a viable exit.

4.2.1. A potentially problematic precedent?

The action by the XIV could be seen as the setting of a precedent, applicable to other similar future cases. February 2 the Portuguese Secretary of State Francisco Seixas da Costa stated that "[w]hat is valid for Austria today will be valid for any other country of the Union tomorrow".⁶⁹ This is the logic of law. But this logic is also applied in politics; the foreign policy of a nation is not trustworthy unless it treats like cases alike. It should in this connection be noted that the XIV maintained that their co-ordinated actions were a natural outflow of the application of general principles.

From a realistic political perspective, it might however be questioned if such an order can be of general applicability

The experiences gained from the "Haider affaire" made it clear that an action, like the one undertaken by the XIV, incurs political costs in the form of negative political reactions and tensions between the Member States. When the target is a relatively small state that recently has entered as a Member of the Union these costs may be possible to bear. It can however be doubted if the Union could survive the same type of action targeted against one of the larger Member States. Hypothetically it is possible to speculate about a situation where the Italian Alleanza Nazionale once again enters into negotiations on the establishment of a coalition government. Would it then be politically possible to take measures on the basis of the "fifteen minus one" formula without breaking the backbone of the Union?

4.2.2. No viable exit provided

A second strain of criticism that in my eyes ought to be taken into account when developing strategies for the handling of future similar situations, relates to the action's character of an ultimatum. When the primary objective was not at-

⁶⁹ Bulletin Quotidien Europe, no 7647, p.3.

tained, and the concrete measures consequently initiated, the only clear possibility for exit was that the ÖVP/FPÖ coalition government resigned. To unconditionally lift the measures without attaining this objective would have amounted to an implicit admittance that the action had been a mistake, thereby incurring a loss of political credibility. The XIV must however have been quite aware of that it was unlikely that they would be successful. The likelihood of a democratically elected government to resign, implicitly or explicitly as an answer to external pressures, is very small, or non-existent. The hope expressed by Rudolph Scharping, that the "mistake" soon would be corrected, was nothing more than wishful thinking.⁷⁰

Furthermore, if the coalition government had been dissolved, for any reason, the Austrian general public would probably have seen this as capitulation to external pressures. Consequently a resignation would probably have caused a national constitutional crisis in Austria of unforeseen magnitude. From this follows that it is likely that the action of the XIV motivated the coalition partners, ÖVP and FPÖ, to get along. Thus, the likeliness of that the measures taken by the XIV would be successful, with regard to their stated objective, was minuscule but, once initiated, they had to continue in order not to lose political credibility.

Under the pressure of the widespread criticism and the potential negative effects of the Austrian counter measures,⁷¹ the opening of a possibility for exit became an issue of increasingly higher priority for the XIV in late spring 2000.⁷² Such an exit door was created through the report of the "Three Wise Men". However, it could not be avoided that the conclusions of the Report undoubtedly strengthened the international political legitimacy of the coalition government and thereby also the acceptance of FPÖ as a coalition partner. A clear concrete example of this legitimising role of the report is presently to be found on the homepage of the Austrian Federal Government where the full text is published in PDF-format under a direct link.⁷³

4.3. Could the XIV have acted under the Treaty on European Union?

It is much too easy to give proposals for alternatives to political actions of the past. Nevertheless, such exercises might be of some use for handling similar fu-

⁷⁰ See p. 30 above.

⁷¹ See pp. 32–33 above.

⁷² Concerning the political deliberations leading up to the appointment of the "Three Wise Men" see Bulletin Quotidien Europe, no 7724, p. 3; no 7725, p.3; 7745, p.5; no 7747, p. 3 and no 7748, p.3.

⁷³ The main homepage of the Federal Government, in its English version, includes direct links to two documents; The program of the Federal Government and the report of the Three Wise Men. <http://www.austria.gv.at/index.htm>.

ture situations. Undoubtedly the XIV clearly had the possibility to take an alternative route of action by which most of the problems that have been accounted for above could have been avoided.

Through the Amsterdam Treaty, which entered into force 1 May 1999, a possibility for suspension of a Member State that seriously and persistently has acted in breach of the principles mentioned in article 6(1) was introduced into the Union Treaty framework.⁷⁴ This new provision establishes a two-step system with some similarities to Chapter VII of the UN Charter.

The Commission *or* one third of the Member States, after obtaining the assent of the European Parliament,⁷⁵ may initiate an action *for determining* the existence of a serious and persistent breach. The decision is taken by the Council, meeting in the composition of Heads of State or Government, acting by unanimity. Members of the Council abstaining from voting shall not prevent the adoption of such a decision.⁷⁶ Before a decision is adopted, the government of the Member State in question shall have been given the opportunity to submit its observations. When such a determination has taken place, the Council acting by qualified majority may decide to suspend certain rights deriving from the TEU to the Member State in question.⁷⁷ These rights could include voting rights. The Treaty obligations of the suspended Member State shall remain intact.

Thus, this provision imposes on the Member States a new type of constitutional discipline not previously known to the EU-system.

The introduction of this safeguard system for securing the internal abidance to the fundamental values of the Union was primarily seen as a precaution taken in view of a future enlargement of the Union.⁷⁸ From the negotiating history it is reported that it was repeatedly stated that this provision was to be kept for extreme circumstances only, such as the collapse of democratic government.⁷⁹ The high voting threshold underlines the exceptional character: A determina-

⁷⁴ TEU, article 7. See also the corresponding possibility for suspension of rights within the framework of the EC. EC Treaty, article 309.

⁷⁵ The European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its members. TEU, article 7(5).

⁷⁶ TEU, article 7(4).

⁷⁷ When taking decisions under TEU, article 7 the vote of the target-state shall not be taken into account. A qualified majority shall be defined as the same proportion of the weighed votes of the members of the Council concerned as laid down in the EC Treaty, article 205(2). TEU, article 7(4).

⁷⁸ Compare Duvigneau, Johan Ludwig: "Human Rights Protection in the European Union", *Legal Issues of European Integration* 1998/2, pp. 61-91, p. 75.

⁷⁹ Langrish, Sally: "The Treaty of Amsterdam: Selected Highlights", *EL Rev* 1998, pp. 3-19, p. 15. The historic reluctance of the of the Member States to make use of the provision laid down in article 227 of the EC Treaty further supports the view that the procedure under TEU article 7 will only be applied under extra ordinary extreme circumstances.

tion of a serious and persistent breach may only be adopted with the acceptance of all minus one.

Nevertheless, this newly enacted instrument could have been used by the XIV as a basis for an anticipatory action against Austria.⁸⁰

After the installation of the coalition government in Vienna the XIV *could* have issued a declaration as the following:

"We the fourteen governments of Belgium...and the United Kingdom have noted that a new coalition government has been installed in Austria in accordance with national constitutional requirements. We have furthermore noted that one of the political parties forming the coalition has repeatedly and consistently expressed views of opinion that contradict the fundamental principles of the European Union as expressed in the Treaty on European Union, article 6.

We look upon this development with great concern.

We will therefore closely monitor the development of the political situation in Austria, and if, such a step is called for, we will not hesitate to act under article 7 of the Treaty on European Union."

A declaration of this kind would have underlined the seriousness of the XIV's collective position in an express manner, thus exercising a strong political pressure on the government in Vienna. A commitment to the common values would have been demonstrated while the main points of the criticism against the road actually taken by the XIV would have been avoided. By issuing the declaration immediately after the formation of the coalition government it could not be construed as an illegitimate intervention in the internal Austrian democratic process. The unambiguous target of the criticism would have been the values pronounced by FPÖ.

The proposed declaration lacks the character of an ultimatum, it is rather a pronouncement underlining that TEU article 7 is not a dead letter. Since it does not include any form of immediate action there would be no need for an exit. The declaration would thereby also have strengthened the Treaty structure of the European Union.

The motives for the decision by the XIV to choose the road of action that they did are not clear. One explanation might be that they were convinced of that the co-ordinated ultimatum would attain the primary objective, i.e. that a ÖVP/FPÖ coalition would never come into being.

Nevertheless, the idea behind this hypothetical alternative way of action is to some extent reflected in the Treaty amendments laid down by the Draft Treaty of Nice.

⁸⁰ Compare Nergélius, Joakim: "Att missbruka europaintegrationens värden – Om varför EU:s österrikebojkott är förfelad", ERT 2000, pp. 369-375, p. 373.

4.4. The Draft Treaty of Nice

The potentially most important long term development based on the experiences gained from the action by the XIV is probably to be found in the Draft Treaty of Nice. The Draft includes an amendment to the TEU, article 7, by the introduction of a new paragraph 1:

On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four-fifths of its Members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State concerned and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.⁸¹

A preventive monitoring action under this new provision thus has to be initiated by a political decision adopted by the Council. The thresholds for adopting a decision on determining the existence of a *clear risk* of a serious breach or initiating a monitoring action are considerably lower than for adopting a decision determining *the existence* of a serious and persistent breach. In this connection, it should also be noticed that the right of initiative lies with one third of the Member States or the independent European institutions; the European Parliament and, most importantly, the Commission.

It should finally be observed that through a parallel amendment to the TEU, article 46, the competence of the ECJ will be expanded to cover the procedural stipulations in TEU, article 7.⁸² On procedural, but not material, aspects a measures taken under TEU article 7 will thus be made legally reviewable.

This proposed Treaty amendment should be seen as a response to the recommendations made in the report of the "Three wise men" which in its turn reflected the initiative presented by the Austrian Government at the Lisbon European Council. It was drafted on the basis of elaborate proposals submitted to the IGC by the Austrian and Belgian delegations.⁸³

By adding this new first step to the system laid down in article 7 the Member States unquestionably have strengthened the Union's possibilities for constructive action in order to safeguard abidance to the common European values. The "all or nothing approach" of article 7 has been abandoned in favour of a more

⁸¹ SN Doc 533/00 "Treaty of Nice, Provisional text which will undergo legal and linguistic editing", Brussels 12 December 2000, p. 3.

⁸² SN Doc 533/00 "Treaty of Nice, Provisional text which will undergo legal and linguistic editing", Brussels 12 December 2000, p. 11.

⁸³ CONFER Doc 4782/00. Brussels 5 October 2000. A first Belgian proposal for amendment of article 7 was presented already 2 May, CONFER 4739/00. The Austrian government presented its first proposal along these lines 7 June, CONFER 4748/00.

flexible system where measures may be successively escalated. Depending on the political willingness, it will thus make it possible to take precautionary measures at an early stage.

By establishing such a preventive monitoring system within the framework of the TEU, co-ordinated bilateral measures, as the action by the XIV, will largely be pre-empted for the future. However, in a situation where a decision can not be taken within the Council, Member States may still demonstrate disapproval of the political development in another Member State through legitimate *bilateral* measures, like toning down diplomatic representation etc.

5. REFLECTIONS ON THE HAIDER AFFAIR AND EUROPEAN PUBLIC LAW AND POLITICS⁸⁴

We will now try to reflect on what the measures imply for European law and politics. This section, readers should be warned, is speculative.

5.1. A European community of values?

First of all, the Haider affair suggested a change in European discourse. In traditional international law (if there ever was such a thing), internal legitimacy or legality did not matter. What mattered was effective control. But, as has already been indicated, state practice with regard to recognition has changed since the cold war. When the Socialist Federal Republic of Yugoslavia and the Soviet Union dissolved, the member states of the European Communities enacted a declaration, to the effect that the new states should inform the EC if they wanted to be recognised and whether they complied with certain standards set by the EC member states.⁸⁵

Consequently, the earlier neutrality of international law with regard to the internal make-up of states had already lost some ground. The old notion that "what you do on the inside does not matter; what matters is what you do in your external relations" had changed. Behaviour inside the state did matter.

The Haider affair took us another step. The measures enacted against Austria clearly pertained, not to what the Austrian government was doing or planning to do, but to its identity. Many commentators assumed that the XIV reacted

⁸⁴ By "European public law" we mean all public law rules in Europe which are not national, be they traditional public international law or the law of the European Union. This article does not assume any view on the issue whether they are distinct.

⁸⁵ See, i.a., Mahmoudi, Said, "Recognition of States: the Case of Former Yugoslav Republics," in Bring, Ove & Mahmoudi, Said, eds, *Current International Law Issues: Nordic Perspectives*, 1994, p 135. The Maastricht Treaty had not entered into force at the time, and hence there was no European Union.

against the intentions of the ÖVP-FPÖ government, since it had no track-record at the time. But, the declaration by the ÖVP-FPÖ Coalition issued on 3 February contained nothing objectionable. The distinction between express intentions and record, therefore, does not explain the actions of the XIV.

A more sophisticated explanation is needed. It seems that the XIV looked at the composition of the Austrian government rather than at its programme. What matters is not what you do, not even what you officially intend to do, but what you really want to do. We believe it fair to say that probably all of the governments of the XIV have a relatively liberal attitude to immigrants and to immigration, certainly compared with that of Mr Haider. But, pressured by unemployment, domestic sentiments of xenophobia, etc, they have been forced to introduce more restrictive policies. Conversely, Mr Haider and his party, not to speak of his electorate, no doubt would like to introduce a far more stringent policy on immigration. They too, however, are faced with constraints, but from other directions. The effect of these constraints is that the policies of the respective sides seem to converge to a large degree. But, and this is the important point, their dispositions are very different.

Perhaps this indicates that what the XIV were applying was an ethics of disposition (virtue), rather than an ethics of consequences, or perhaps ethos rather than ethics.⁸⁶

What does this imply for Europe? It has been asked why the XIV curtailed their high level relations with Austria when there are full diplomatic and political relations with other regimes, with appalling human rights records? It does not suffice to say that there is a regional international law in Europe, based on the European Convention on Human Rights and Fundamental Freedoms, and codified in TEU article 6.1, which lays down that the Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".⁸⁷ It shall be noted that this wording of article 6 was introduced by the Amsterdam Treaty and shall be contrasted to the formulation of the Maastricht Treaty, article F: "The Union shall respect the national identities of its Member States, whose system of government are founded on the principles of democracy". The Amsterdam Treaty amendment thus constituted a radical change to the extent that instead of just confirming the democratic character of the sys-

⁸⁶ Of course, we are not suggesting that the XIV statesmen were engaged in a disputation on ethics, but to the extent that their reasoning was informed by ethics – and we all have some ethics, developed or not – it would contain element of this sort. And, in any event, that type of reasoning may be read into this series of events.

⁸⁷ In addition TEU article 29 states that the Union's objective shall be to "provide citizens with a high level of safety within an area of freedom, security and justice ...by preventing and combating racism and xenophobia."

tems of government of the Member States, the Union was vested with its own *independent fundamental principles* to which the Member States have to abide.

But besides these principles, article 6 also suggests – but no more than suggests – a disposition, related to “a European community of values”,⁸⁸ necessary for European integration. The questions given to the three wise men confirm this impression, since they dealt with the Austrian Government’s commitment to the common European values and the political nature of the FPÖ, not with whether there had been any technical breaches of the law.

But the importance of these values – as distinct from rules – is not spelt in the Treaty on European Union, which only refers to principles (legal rules). Instead, it is in the Statute of the Council of Europe, whose preamble speaks of “spiritual and moral values”, and where the aim is to safeguard and realise not only principles but also ideals (article 1). Interestingly enough, the XIV seemed to have the same notion suggested by this observation, namely that it was the Council of Europe and its European Court of Human Rights which was the guardian of the European community of values, rather than the more business-like founding treaties of the European Union. After all, it was the president of the European Court of Human Rights in Strasbourg, and not the European Court of Justice in Luxembourg, who was asked to appoint the three, and their findings were mainly based on treaties of the Council of Europe.

If traditional international law is, at best, interaction between business partners, which requires nothing more than fidelity to a set of ground rules, the European Union finds itself to be something more. It is conceived of as a group of friends,⁸⁹ or even a family.⁹⁰ Regardless of whether you think of it as a circle of friends, with common values and mutual liking, or as a family, with inseparable bonds, there has to be a mechanism against unwelcome members – the strange inlaw or the bullying friend of a friend. The Haider affair, in a sense, put the finger on a gap between the basic idea prevailing in the Treaty on European Union and its communities – peace through trade and co-operation – and what had been taken for granted, but not formally implemented in the treaty – the common values of human rights. The family was still organised as a business venture.

⁸⁸ Expressions of this type were quite common in the discussion during the Haider affaire, e.g., the Portuguese Secretary of State for European affairs Seixas da Costa (“a project of civilisation”, “essential values that underpin European construction”), Bulletin Quotidien Europe, No. 7647, p 3 and the Schüssel government itself (“the European community of values”), Bulletin Quotidien Europe, No 7712, p 7.

⁸⁹ The Portuguese Secretary of State for European affairs Seixas da Costa, Bulletin Quotidien Europe, No. 7647, p 3.

⁹⁰ See a review of a discussion in the European Parliament, Bulletin Quotidien Europe, No 7698, p 3.

5.2. National and supranational politics and democracy

Another, and different, aspect of the affair relates to what it entails for the distinction between domestic and foreign policy.

First of all, it is obvious that the domestic policy of Austria was considered to be a legitimate concern of the foreign policy of the XIV. This is not new, but is a common place in post cold war international politics, as has already been mentioned. And this entails that one state has a right to object to the policies of another state, even if the policies of that latter state are democratically based.

It has been alleged that the measures against Austria contravened democracy (this in distinction to the reactions of the international community with regard to, i.a., Haiti and Sierra Leone). But that misses the point that it is perhaps not the people's prerogative to elect any government they may please. In an internationalised or even globalised world, it may be argued that the people should be accountable to other peoples, and hence the democratic choices of one people shouldn't necessarily be respected, because they may intrude on the democratic rights of other peoples or violate common values and interests. If the people is in charge, the people has to be accountable. And this is even further pronounced within a close circle of States, such as in liberal Europe.

This problematique can be taken even further. It has been remarked that not only is the domestic politics of one member state relevant to other member states, its domestic politics *are* also the domestic politics of all member states.⁹¹ In many subject areas, the bulk of legislation comes from the European communities. No one would find it strange if Jacques Chirac decided to boycott Front National within the realm of French politics. As the leader of a party in power in an EC Government, Jörg Haider would, however, have more direct influence on French agriculture or immigration policy than Jean-Marie Le Pen will ever have. Despite that, Chirac has no influence on the making of the Austrian government. Consequently, he is left with the option to boycott Austria as such.

Of course, this is the result of the anomaly that the union is one legal sphere, with legislation affecting everyone equally, but essentially is divided into fifteen political compartments, where political forces are formed in isolation from one another, until they meet in the Council of Ministers. With a slight exaggeration, there is a split in the concept of citizenry. There are some 350 million people to a very large degree affected by the same legislation, and hence being European citizens in the sense of being subjects of law, but fifteen different demoi, i.e. electorates, which provide the foundations for the supranational, European

⁹¹ The former remark pertained to the fact that country X, in its *external relations* with country Y, raises concerns over the domestic situation in Y. This, second, remark means that the domestic situation in Y is *a part of the domestic situation* in X.

politics where all this legislation is made.⁹² The Haider affair highlights the fact that the structure of European democracy has its problems of national exclusion and of transnational unaccountability.⁹³

But there is also another implication, which seems to follow from the same state of affairs. The XIV were acting outside of the sphere of the union. They were acting *qua* leaders of XIV sovereign states. In fact, the measures were carefully drafted so as to avoid any legal EU implications, and within the EU, business went on as usual, at least formally. But to the degree that it was not business as usual *realiter*, this goes to show that the functioning of the Union still depends on normal diplomatic means, such as good relations between the ministers, and contacts outside of the EU institutions. The fact that the measures against Austria created such a fuss reveals that we are still, partly, in the mode of bilateral diplomacy and not multilateral *d:o*,⁹⁴ and even less of supranational parliamentary politics, where groups align according to group interests rather than national interests.

6. FINAL COMMENTS

From a legal point of view it is submitted that the XIV did not commit any clear infringements of their duties under public international law or European Law.

Nevertheless, the action has had, and will have, a substantial legal-political impact on the European integration process, and we are here implicitly referring to the six lines of criticism referred to in section 2.

To what extent the action by the XIV has affected the long-term political position of right-wing populist parties in the Member States is evidently hard, or impossible, to assess. There seem so far to be no hard facts indicating that the action by the XIV has strengthened right-wing populism on the European political scene. Nevertheless, the revocation of the measures, on the basis of the

⁹² For sure, the European Parliament has a role, but that has yet to be discovered by the European electorates.

⁹³ This is not the problem which has been labelled democratic deficit. The problem with the misfit between citizenry as subjects and as demos does not relate to the long distance between the electorate and the decision-makers; in fact, if the Commission had been more powerful, Mr. Haider had been less of a problem. Nevertheless, both problems suggest the same solution, the further empowerment of the Parliament. This article takes no position on whether that necessarily would be desirable.

The problem of democracy in the Union and with regard to globalisation has been discussed to some extent during the last years. For two intelligent examples, see Weiler, Joseph H.H., *The European Constitution: "Do the new clothes have an emperor" and other essays on European Integration*, 1999, p 264-285 and p 324-256 and Marks, Susan, *The Riddle of All Constitutions*, 2000, p 101-120.

⁹⁴ Cf. Gottlieb, Gidon, "Global Bargaining: The Legal and Diplomatic Framework", in Falk, R., Kratochvil, F., & Mendlowitz, S.H. eds., *International Law: A Comparative Perspective*, 1985, p 210-236.

Report by the Three Wise Men, might be exploited as an argument favouring the acceptance of parties like the FPÖ as serious actors in the European political life.

From a general perspective the Haider affaire may also be seen as an example of an ongoing trend, where the Member States are strengthening their collective position in relation to the Commission and the European Parliament. The long-term effects on the integration process that might accrue from such a development are of course impossible to foresee.⁹⁵ However, it could also be argued that the XIV and the Commission supplemented each other in a pragmatic way for the benefit of the Union: During the period of the "Haider affaire" there existed two central priorities for the Union that had to be handled simultaneously. A strong political need to firmly demonstrate disapproval of the political development in Austria and the necessity to maintain the functioning of the institutional framework in order to secure the running of the Intergovernmental Conference⁹⁶ and the ongoing accession negotiations. By distinctly dividing the roles between the Member States and the Commission both of these objectives could be pursued simultaneously. To put it in more concrete terms: The XIV could allow themselves to be tough on Austria because the Commission pledged itself to guarantee the working of the Union.⁹⁷

With regard to the European Parliament it shall be noted that its position was hardly weakened by the action of the XIV. On the contrary, it became an important European forum for discussions on the situation in Austria and by a clear majority of the parliamentarians it supported the action by the XIV.

Two other points of criticism referred to above concerned the lack of exit and the allegedly dangerous precedent created by the action. Both of these issues seem to have been of concern also for Member States. The amendments to TEU article 7, included in the Draft Treaty of Nice, clearly reflect experiences gained from the action against Austria, and they are designed to be used in similar situations in the future. The new provisions are related to the existence of a clear risk of a breach of the principles mentioned in article 6(1). Thereby the proposed amendment introduces greater flexibility into the system through a possibility to gradually escalate measures. In addition to the competence of the Council to determine the existence of a clear risk it opens up the possibility to decide upon the establishment of ad hoc groups of independent persons in or-

⁹⁵ It should be noted that Romano Prodi, in a speech before the European Parliament, 3 October 2000, referred to the action by the XIV as an example of the development of an undesired intergovernmentalism that "...ended up by creating an artificial distinction between the bilateral action of the Member States and action by the Union as a Whole", "Speech/00/352 Romano Prodi President of the European Commission, Plenary Session of the European Parliament, Strasbourg 3 October 2000".

⁹⁶ The Intergovernmental Conference was opened February 14, 2000.

⁹⁷ Compare editorial by Ferdinando Riccardi in *Bulletin Quotidien Europe*, No 7650, p. 4.

der to analyse the political situation in the Member State in question. Accordingly, the form of action outside the framework of the Union that was undertaken by the XIV will be pre-empted in the future. The collective bilateral measures against Austria will therefore not constitute a pattern for future actions in similar situations.

Nevertheless, it has to be underlined that all actions under article 7 require the existence of a common political will among the Member States in question. The political costs incurred for taking action against a Member State in accordance with article 7 will certainly differ from one situation to another, reflecting the political dynamics between the Member States within the Union. Thus the problems relating to the political possibilities of a general application largely remain.⁹⁸

Finally, and most importantly, the "Haider affaire" has undoubtedly put the spotlight on a number of fundamental questions relating to the future of European integration.

Within the Union the Member States have entered into a close relationship that includes the acceptance of legislative, administrative and judicial decisions by common institutions. Most evidently, Community law is accepted as the supreme law of the land in all Member States. A fundamental and essential prerequisite for this acceptance is the existence of mutual constitutional trust.⁹⁹ From the perspective of one Member State, such trust requires that the political systems *in all other Member States abide by the fundamental principles of liberty democracy and fundamental human rights and freedoms*. The commitment by all Member States to these fundamental principles thus constitutes an essential pre-condition for the existence of the Union

Through the introduction of the revised TEU article 6 by the Amsterdam Treaty the Member States decided to codify an already existing set of principles (and implicit values) of fundamental importance for the Union structure, in order to further a lasting mutual constitutional trust. This provision was supplemented by the possibility to take a political decision on suspension of a Member State, which gravely and persistently has acted in breach of these principles. When adopted, these amendments were primarily seen as a precautionary measure taken in the view of future enlargement. As a reaction to the experiences gained from the action by the XIV these formal instruments for furthering the stable abidance to the fundamental values have been elaborated and refined.

The overall long term effects of the action by the XIV remains to be seen. For those of us who do not believe that there is such a thing as a "natural" development of values, at best this series of events will further the setting of baselines

⁹⁸ See page 52–53 above.

⁹⁹ Compare Weiler, Joseph: "The Function and Future of European Law", in Heiskanen, Veijo; Kulovesi, Kati ed: "Function and Future of European Law", pp. 9–22, pp. 14–15.

for a European Community which is not a community of business, nor a community of heritage and origins, but a community of fundamental values.

The development of Treaty provisions for safeguarding values may be a useful instrument to further the development of such a Community. However, we should not fool ourselves to believe that Treaty provisions could be a substitute for political will among Member States and among Europeans. The establishment of a stable community of values is a project that primarily has to be based on a widespread common consciousness and an ongoing non-exclusive discourse. The most important outcome of the "Haider affaire" is undoubtedly that it has provoked the start-up of such a process.