EUROPEAN INTEGRATION AND HUMAN RIGHTS' CULTURES IN EASTERN EUROPE: THE EU AND ABOLITION OF CAPITAL PUNISHMENT IN ESTONIA

Neil J. Brennan*

"We know that no civilised country has the death penalty....And when Russia becomes civilised, we won't either."[1]

Introduction

Since the collapse of the authoritarian regimes of the former Soviet Union and its' Central and East European satellite states, new governments throughout the region have plunged headlong into a frenzy of constitution (re-)writing, treaty-making, convention ratification and legal drafting the scale of which has never before been seen. In the midst of this chaotic rush to reform the almost universally stated objectives of the new governments of the region are clear: to establish liberal democratic states based on free market economies and the rule of law founded in a respect for human rights through ratification of international and regional rights treaties, especially the European Convention for the Protection of Human Rights.[2] For states so long under the iron will of a singularly violent, totalitarian regime, these are admirable objectives. Certainly this is the conclusion reached by Western liberal democratists who regard these attributes as the *sine qua non* of civilised nations.

As we celebrate the 50th Anniversary of the Universal Declaration of Human rights, the foundation of all modern human rights instruments,[3] we might be tempted to regard this spirited regional movement toward the legal endorsement of the normative values of the Declaration as re-stated in the ECHR as a true "standard of achievement for all peoples and all nations."[4] This author challenges this conclusion. It is suggested that the rush by newly independent states to align new constitutions with Western liberal

---

*LL.M. (Calgary), LL.B. (UNB), Diplome (Strasbourg), B.A. (Mount Allison). The author is a Visiting Lecturer in Law at the University of Tartu, Estonia with Civic Education Project. In the 1996-97 academic year he held the same position at the State University of Moldova in Chisinau, Republic of Moldova. The author would like to thank J.P. McEvoy (UNB Faculty of Law) for his support and for his helpful comments on an early draft of this article, Juhani Kortteinen (Helsinki University - Eurofaculty) without whose input this article would have been incomplete and Vello Pettai (University of Tartu - Eurofaculty) for providing copious amounts of crucial information and translations.

[1]Statement by a Russian delegate to a human rights conference in 1995, as reported in, "Legalised murder?" (1997) 5 Business Central Europe (No. 46) 24.

[2]*European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter the "European Convention on Human Rights", or "ECHR"), (1950) Eur. T.S. No. 5, 213 U.N.T.S. 221.

[3]H. Hannum, "The Status of the Universal Declaration of Human rights in National and International Law", (1996) 25 Ga. J. Int'l & Comp. L. 287 at 289.

[4]Preamble to *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, G.A. Res. 217A (IIII), 3 U.N. GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810(1948).

democratic ideals[5] and to embrace the most demanding of regional rights conventions is not necessarily a movement based in widespread altruistic concordance with the inherent values of these structures. On the contrary, this author contends that this movement is premised on the more base concern of economic reform. In fact, it is suggested that successful wholesale transition by these states to liberal democratic states with human rights cultures in the near future is unlikely. In some cases this prospective path to reform may even be unwelcome absent concomitant promises of economic assistance in transition and longer term promises of freer trade. It is more likely that for many of these new governments the lofty goals associated with their reform efforts are "simple negations of the former system"[6] of government adopted for the political purpose of satisfying Western demands rather than as essential derivatives of "a shared community of values".[7] Consequently, fundamental legal and social reform in Central and East Europe has predominantly been secondary to economic reform and relevant largely only as a consequence of Western demands. Nonetheless, absent economic integration and an improvement in the material well-being of these societies, successful transplantation of the normative values of the Western liberal rights paradigm and long term legitimacy for these nascent democracies are all but impossible.[8]

This paper outlines the relationship between the development of human rights cultures in Eastern Europe and the promise of economic integration with Western Europe. In particular, this article describes the motivations behind the expansion processes for the Council of Europe and the European Union[9] to include, among others, the Republic of Estonia. It outlines how the abolition of capital punishment has evolved

---

[5]For evidence of this trend see, B. R. Roth, "Constitutionalism in Eastern Europe: Alternatives to the Liberal Social Contract" (1993) 11 Dickinson Journal of Int'l Law 283. Ludwikowski meanwhile claims that among the new constitutions no single model prevails: R. R. Ludwikowski, "Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe" (1995) 3 Cardozo Journal Int'l and Comp. L. 73.

[6]A. Sajo, "New Legalism in East and Central Europe: Law as an Instrument of Social Transformation" (1990) 17 Journal of Law and Society 329 at 329.

[7]D. Seymour, "The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks" (1993) 8 Conn. J. of Int'l Law 243 at 245.

[8]This of course presupposes that adoption of the Western liberal rights paradigm of law and constitutionalism should be the preferred choice of action by these states. The author does not necessarily endorse this choice. The present challenge to the potential for successful adherence to this paradigm is made only for the purposes of discussion. For a discussion of alternative models, see Roth, *supra* note 5.

[9]The European Union is the name given to the broader union which includes the former European Communities after the coming into force of the *Treaty on European Union* (TEU), *Maastricht Treaty*, in November of 1993. This same treaty renamed the former European Economic Community (one of the three institutions joined to form the former European Communities along with the European Atomic Energy Community (Euratom) and the European Coal and Steel Community (ECSC)) the European Community. As a result, there is the potential for considerable confusion as to nomenclature depending on the historical context to which one refers. The author has chosen to use but one term, that of the European Union, "EU" for the sake of simplicity unless it is simply historically inaccurate. For clarification, please see S. Bronitt, F. Burns, and D. Kinley, *Principles of European Community Law* (Ontario: The Law Book Company Limited, 1995) at ix.

through the ECHR to become one of the prerequisites to membership in both the Council and the EU for all prospective members among the newly independent states. Further, this article describes how Estonia, regarded as one of the leaders among these states in aligning itself with the Western world economically and politically,[10] has managed to continually evade acceding to the prerequisite of abolition.[11] This fact is portrayed as part of a larger trend of intransigence among the newly independent states in accepting the totality of a European human rights culture as a consequence of the hindered development of these ideals during totalitarian suppression. In this manner this paper simply provides a guide to the processes established by the Western European community for economic and social integration by the newly independent states. It briefly describes how Western Europe underwent a similar transition in the post-World War II era which has resulted in a Europe unified on the economic plane and in large agreement with regard to normative social values. This commentary then examines some of the difficulties faced in trying to inculcate more civilised societies among the Central and East European and CIS states[12] through integration into this new European economic and social context.

Part I of this paper provides a brief outline to the interaction between social and economic reform and constitutionalism and stresses its importance to Central and Eastern European and CIS states. As well, the importance of successful reform among these nations for all of Europe is suggested. Against this background, Part II outlines the process by which the Council of Europe's Convention on Human Rights and its Protocol 6 has become a supranational norm of a pan-European human rights culture as part of the *acquis communautaire* of the European Union. This entire process is presented as exemplifying the strategic direction taken in the post-World War II era to establish a "federal" Europe through social and economic integration.[13] This section then shows how the adoption of the ECHR and abolition of capital punishment have become prerequisites for prospective member states in the outward expansion of the Council of Europe and the EU.

In Part III the legal re-emergence of Estonia is detailed. Estonia is portrayed as a nation which has always believed itself to be a fully Western state at heart, if not in political fact during Soviet occupation. This chapter suggests that Estonia stands well

---

[10] See generally, Marju Lauristin & Peeter Vihalemm, eds., *Return to the Western World: Cultural and Political Perspectives on the Estonian Post-Communist Transition* (Tartu, Estonia: Tartu University Press, 1997) at 197.

[11] The author is aware of the perception outside Estonia that this country's greatest human rights issue is that of the treatment of its Russian minority. This issue has been thoroughly discussed elsewhere. See, for example, the exceptionally thorough treatment by the author's predecessor at University of Tartu, R. C. Visek, "Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia" (1997) 38 Harvard Int. L. J. 315.

[12] The Commonwealth of Independent States, hereinafter the "CIS states".

[13] N. Nugent, *The Government and Politics of the European Union* (MacMillan: London, 1994) at 65.

poised for re-entry to the Western fold as a nation perceived to have the requisite social capital for successful accession to the normative values of the Western world. On this basis, this section then provides a brief overview of some of the constitutional and other measures taken by Estonia and other nations to make their legal systems amenable to the pre-conditions to membership set out by the Council of Europe and the EU. This is followed by an outline of the process followed by Estonia in joining these two institutions. It describes how Estonia has, to most outward appearances, taken great measures to comply with the prerequisites to membership in both institutions while repeatedly failing to ratify the Council's documents for the abolition of the death penalty. In this fact, it is suggested, one may distinguish a rift between the normative values of the newly independent states and the rest of Europe.

In the conclusion, the author considers how the Council and the EU have been forced to retreat from demands for strict adherence to their European human rights obligations, most likely in the interest of cultivating longer-term reform on a regional scale. The author then examines this fact in particular as part of what will be a very long road to development of human rights cultures in Eastern Europe as a consequence of the Soviet-dominated past.

Part I - Economic and Social Reform and Constitutionalism

While it is by no means a novel contention to suggest that social and economic reform are linked, the scale and importance of this link in Central and East Europe and the CIS region is entirely original. As the declared enemy of the Western world for a good part of the twentieth century, the region now comprises some twenty five newly independent states of which several have unstable governments, often with extensive organised crime networks. Some of these states have even reverted to totalitarian rule.[14] This situation is exacerbated by the fact that some of these nations retain access to nuclear weapons and material. With a combined land mass covering one quarter of the earth's surface and a population of over four hundred million people, it has been said that "Central and Eastern Europe reaches so far that it touches practically all of the 'burning topics' of present world politics."[15] Many of these liberated states are heavily armed with conventional weaponry and mined with ethnic and religious strife, some of which have led to large-scale hostilities. It is a region populated by sizable minorities and endowed with tremendous natural resource wealth. The near surreal nature of these circumstances is even further aggravated by the economic crises these nations are undergoing. As a result, it is hardly contentious to suggest that stability in this region

[14]See, for example, G. York, "'Papa' rules Uzbekistan with an iron fist" (25 November 1997) *The Globe and Mail* A1.

[15]M. Butora, "The delayed return of the prodigal sons: Reflections on the emerging democracies in Central and Eastern Europe" (1992) 7 Am. U.J. Int'l L & Pol'y 435 at 438.

is important for the Western world. Thus, successful social and economic reform among these nations is critical.

The transition process in this region has now been underway for more than seven years. In states such as Poland, Hungary and the Czech Republic, there is sufficient evidence to conclude that a successful transition to a market economy is possible.[16] But the second aspect of transition, that of establishing liberal democracies based on the rule of law entails far more than the capacity to conduct secure capital transactions. And even though many new constitutions have been written among these nations, as Teitel observes, "even the best-designed constitution cannot by itself ensure a constructive, forward-looking attitude, ethnic peace, and economic prosperity. Constitutional remedies cannot by themselves eliminate destructive feelings of revenge, ethnic hatred and envy."[17] Putting to rest the vestiges of a system notorious for its systemic disregard for human rights and life in a region where suppressed nationalist tendencies are now finding expression includes, among other factors, overcoming deeply seated "societal disrespect for law" among some of the region's populations and established ruling elites and perpetual intransigence on the part of still entrenched socialist bureaucrats.[18] As McConnell observes, these must be overcome because;

> in any form of constitutionalism, there must be both a formal and attitudinal component....the term "constitutionalism" imports that once a final and authoritative decision has been made, state officials and others will abide by and implement the decision so made. Constitutionalism, accordingly, in a very basic sense, signifies the internalization within the bureaucracy, the military, and ultimately the people as a whole, of supporting positive attitudes towards the constitution. For the constitution to endure, or for it to possess "political legitimacy," a majority of citizens....should support it....[19]

One may conclude that successful transition to and sustainability of a new political order ultimately requires a concurrent legitimisation of the order by the population it is

---

[16]"Let Battle Commence" (1997) 5 *Business Central Europe* (No. 44) at 19.

[17]J. Elster, "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea" (1993) 71 Public Administration 169 at 174. As Kay similarly observes, "[t]he effectiveness of law is a function, in large measure, of the readiness of society to embrace it. By itself law can do nothing. It can channel, refine and strengthen values and possibilities already embedded in the society. It can aim high, but no higher than the people it aspires to govern...."; Richard S. Kay, "The European Convention on Human Rights and the Authority of Law" (1993) 8 Conn. J. Int'l L. 217 at 225.

[18]M. Holland, "An Emerging Conception of Fundamental Rights in Contemporary Russia" (1992) 1 New Europe Law Review 1 at 18.

[19]W.H. McConnell, "Canadian Constitutionalism: A Comparative Perspective", in *Contemporary Law: Canadian Reports to the 1994 International Congress of Comparative Law* (Cowansville: Editions Yvon Blais, 1995) 484 at 487.

meant to serve. [20] This, in turn, presupposes public consciousness of and appreciation of the fundamental values which form this new order. Public consciousness and understanding of the value of fundamental rights are dependent on, among other factors, the objective conditions of their existence.[21] And, as all are well aware, the conditions of the material existence of all of these peoples faltered tremendously after the fall of the Berlin Wall. Many people in these nations still suffer from shortages of basic amenities. Shortages of heating fuels, regular hot water, proper food, and dwindling purchasing power for salaries governments may not even be able to pay, are only a few of the well documented economic travesties visited upon the newly liberated states. It is in this chaos that the legitimisation of a new political and social order built upon the normative values of the international human rights regime is meant to occur.[22]

Consequently, since the fall of the totalitarian regimes of these states, the populace has been desperate for and largely supportive of economic reform. In this region, as for much of the world, economic development and wealth are equated with Western civilization. Thus, the predominant perception in this region is that any connection to the Western world will give rise to greater recognition which in turn will, directly or indirectly, lead to increased trade. The inevitable result, according to popular conviction, is a much improved standard of living. For this reason, almost immediately upon attaining independence, Central and East European and CIS states sought membership in a broad range of international Western institutions including the Council of Europe, the European Union and the NATO Alliance. For their part, to establish peace and stability in the region, to expand markets and to enhance spheres of influence, European states were quick to try bringing these nations in from the cold to the warm hearth shared by civilised nations. However, this movement has been predicated on a willingness to adopt the normative values considered as the basis of civilised nation-states.

One may conclude that Western and Eastern Europe are now locked in a bizarre embrace. Irrespective of a lack of recent shared legal heritage or socio-political values, the newly independent states enthusiastically state a willingness to accept the membership preconditions in European and other Western institutions often for purely

---

[20]A good example of the development of this attitudinal aspect of constitutionalism can be found in Canada. Since the adoption of the *Charter of Rights and Freedoms* in 1982, there has developed a widespread, popularly supported culture of rights, one now thoroughly internalized. In most jurisdictions law makers now subject their work to institutionalized "pre-legislative review" to ensure compatibility with the *Charter*, a role that has been described as being as important to the furtherance of the rights culture as that of the judiciary. This is because, "[t]he Charter has created expectations on the part of the people that Canadian governments ignore at their peril"; A. F. Bayefsky, "Mechanisms for Entrenchment and Protection of a Bill of Rights: The Canadian Experience" (1997) 5 EHRLR 496 at 499.

[21]I.B. Mikhailovskaia, "Constitutional Rights in Russian Public Opinion" (1995) 4 Eastern European Constitutional Review (No. 1) 70 at 70.

[22]For a general critique of the costs of rights implementation among these states, see R. A. Posner, "The Costs of Rights: Implications for Central and Eastern Europe - and for the United States" (1996) 32 Tulsa L.J. 1.

political reasons[23] and especially in the hopes of increasing living standards. This requires that they attempt to institute entirely new social orders with which they have virtually no affinity. Without an increase in the objective living standards of the populations of Eastern Europe, something that comes with economic integration, it is unlikely that the new social orders can establish a base legitimacy let alone sustain themselves through a difficult economic transitional period.[24] The result is that Western European states may have no choice but to assist these states in transition, if not for the higher purpose of providing more meaningful existences for these people, then for the protection of their own European "way of life".[25]

Part II - Supranationalisation of a Human Rights Culture in Europe

a. The First Reconstruction of Europe

Western states have been largely supportive[26] of their Eastern cousins in their efforts to regain democratic values and market economies following the collapse of the Soviet Empire. Throughout Europe there is a general air of combined relief at the unexpected collapse of the former enemy and optimism at the prospects of a re-united Europe. Indeed, it was not so long ago, in the aftermath of the near apocalyptic events of the Second World War, that Western Europe faced its own potential collapse and was forced to undergo economic, social and political reform which resulted in the formation of the Council of Europe and the EU.

In the sphere of social and political reform, at its infancy the Council of Europe was intended to represent a unified front against aggressive despotism on the order of Nazism from within its membership and against a threat of communism from the former USSR. From the *Travaux Preparatoires,* it is clear that the purpose in forming the

---

[23]W. Bowring, "Russia's Accession the Council of Europe and Human Rights: Compliance or Cross Purposes?" (1997) 6 EHRLR 628 at 634.

[24]It has even been suggested that democracy and justice may not be pursued at the same time such that the pursuit of justice must be made subservient to the goal of constructing a democratic society; see M. Gibney, "Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future" (1994) 23 Denv. J. Int'l L. & Pol'y 87 at 88.

[25]See, for example, comments made in the Council of Europe's Parliamentary Assembly in support of Russia's membership in the Council: "Europe cannot be secure without Russia", and,""If Russia is not accepted today, there will be a political Chernobyl", as cited in Bowring, *supra* note 23 at 632.

[26]The author qualifies this statement because of a perceived failure of Western states to engage in the transition to civil society in these states by at least one significant individual, George Soros. Soros, a Hungarian immigrant to the United States who has amassed a fortune in mutual funds and currency speculation, has contributed over one billion American dollars to assist reform among these nations through the Open Society Institute, an institution he established based on the philosophy of Karl Popper. See, G. Soros, *Soros on Soros: Staying Ahead of the Curve* (Toronto: John Wiley & Sons, 1995). One of the projects assisted by the OSI is the author's own employer, Civic Education Project.

Council was to create a mechanism for the protection of human rights premised on the need to " 'prevent a rebirth of totalitarianism', to 'defend our peoples against dictatorship', and to 'strengthen the resistance in all our countries against insidious attempts to undermine our way of life.' "[27] The second insidious threat to this European "way of life" was the then Soviet Union's expansion into Central and Eastern European states. This constituted a grave threat to democracy and the rule of law throughout the remainder of Europe. To counter it, the Council declared that its forthcoming Convention on Human Rights had the ambition to "'define and guarantee the political basis of this association of European nations,' to ensure that the States of the Members of the Council of Europe are democratic,' and to set forth a 'code of law for the democracies.'"[28]

Similarly, the European Union was also envisioned as a means of raising Europe above the devastation of the Second World War. These nations set out with the purposes of reconciliation, integration, and the reconstruction of Europe[29] in mind. It was felt that these tasks could best be achieved by encouraging more and freer trade among themselves with the ultimate objective of a full economic union among members.[30] And, as Robert Schuman declared, this would lead "to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace."[31] Jean Monnet, the "father of the EU", clearly meant for this union to eventually become a political union, a cause which German Chancellor Helmut Kohl has since taken up claiming that ever greater political integration is a matter of "war and peace" in Europe.[32]

As a matter of strict legal definition the Council of Europe and the European Union have no formal relationship except for some overlap among the membership roles, a related genesis process[33] and the mutual ultimate objective of a peaceful Europe. In a

---

[27]S. Marks, "The European Convention on Human Rights and its 'Democratic Society" (1995) 66 British Yearbook of Int'l Law 209 at 210.

[28]*Ibid.* at 211.

[29]Bronitt, *et al.*, *supra* note 9 at 7, 9-10.

[30]With its own judicial arm, the European Court of Justice presiding in Luxembourg, the European Parliament of the EU sits in Strasbourg while the Commission (the executive arm which proposes laws) and Council of Ministers (ministerial representatives from member states who legislate) of the EU sit in Brussels. "The completion of the final stage of economic union involves a full integration of the member economies with supranational authorities responsible for economic policy making...an economic union demands a positive agreement to transfer economic sovereignty to supranational institutions"; F.R. Root, as quoted in John Tillotson, *European Community Law* (London: Cavendish Publishing Ltd., 1994) at 32.

[31]*Europe - A Fresh Start: The Schuman Declaration*, 1950-90 (Office for Official Publications of the European Communities, 1990).

[32]Kohl has also referred to the EU as "the great goal that we and our European friends have in common- a United States of Europe"; see, "Hopping on the juggernaut" (1998) 346 *The Economist* (Issue 8049) 33 at 33.

[33]See Bronitt, *et al.*, *supra* note 9, at 9-17.

more practical and realistic sense, there is a close relationship between the two and it continues to deepen. The locus for this deepening relationship is in the application of the ECHR by both the Council of Europe and the EU and, more significantly, in the parallel eastward expansion by both institutions. This is because, since regaining their independence, the first gesture toward association with Western Europe among the newly "democratic" regimes of Eastern Europe has been membership in the Council of Europe.[34] For the more ambitious states, the European Union has been regarded as the brass ring of the transition process. And, as will be shown, the relationship between these two institutions is now an interlocking framework for supranational economic integration based on democratic values, the rule of law, and a distinct human rights culture premised on a respect for life. It is into this complex framework that the newly independent states are expected to fully integrate.

b. The ECHR

> Considering the Universal Declaration of Human Rights proclaimed by the general Assembly of the United Nations....
>
> Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty, and the rule of law, principles which form the basis of all genuine democracy....
>
> Being resolved, as the Governments of European countries which are like minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights as stated in the Universal Declaration;[35]

From the Preamble to the ECHR it is clear that this project was meant to build not only upon the values of the UDHR, a measure consistent with the United Nations Charter's call for joint action by member states to establish respect for fundamental rights,[36] but also upon those values claimed to be part of a European homogeneity. Despite this claim, it was evident in the early days of the Council that this homogeneity was infirm. Rather, in the midst of the widespread devastation incurred by many of these states and the rampant political chaos which the Marshall Plan attempted to counter, serious political, social and religious cleavages were manifest among many of the Council's original Member States. As a result, to counter these problems and to advance the objective of a peaceful Europe, the Council's *de facto raison d'etre* became more the

---

[34]Kay, *supra* note 17 at 218.

[35]Preamble to the ECHR, *supra* note 2.

[36]Article 56, *Charter of the United Nations*, adopted 26 June 1945, entered into force 24 Oct. 1945.

forging of this claimed homogeneity rather than its defence. As Article 3 of the Council's founding Statute claims:

> Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.[37]

Thus, it is an imperative to membership in the Council that states accept these values once they become a member. It is evident that the "maintenance of human rights and respect for the rule of law are .... not just objectives of the Council of Europe, they are actually made conditions of membership."[38] This conclusion may be made all the more emphatic when one refers to the terms of Article 8 of the Statute. If a state fails to uphold these values, in accordance with this provision it may be subject to suspension or expulsion from the Council.[39]

As a more extensive elaboration of the meaning and content of the human rights the Council of Europe intended to collectively secure and to institute a judicial mechanism for this purpose, by 1950 the Council had agreed on a comprehensive list of civil and political rights to be enshrined in the ECHR.[40] Based on the then recently adopted Universal Declaration and the then projected International Covenant on Civil and Political Rights,[41] the Preamble to the ECHR states "that the fundamental freedoms it takes to be the 'foundation of justice and peace in the world' are 'best maintained on the one hand by an effective political democracy and on the other by....observance of the human rights upon which they depend."[42] Leaving no doubt as to whom were the perceived threat to these foundations of justice and peace, and prophetically, who could best benefit from their observance, David Maxwell Fyfe, the principal British legal architect of the ECHR, declared to the British Parliament in 1950 that this Convention was to act as "a beacon to the peoples behind the Iron Curtain, and a passport for their return to the midst of the free countries."[43]

---

[37] *Statute of the Council of Europe*, adopted May 5 1949, entered into force 3 Aug. 1949, ETS 1.

[38] A.H. Robertson and J.G. Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights*, 3rd Ed. (New York: Manchester University Press, 1993) at 2-3.

[39] As discussed below, Russia, Ukraine and Latvia all are currently at risk of expulsion from the Council for violations of obligations of membership: see Bowring, *supra* note 23, at 642.

[40] E. Heffernan, "A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights" (1997) 17 Human Rights Quarterly 78 at 81.

[41] *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966), hereinafter, the "ICCPR".

[42] Marks, *supra* note 27, at 209.

[43] As cited in Anthony Paul Lester, "The European Convention in the new architecture of Europe" (1996) Public Law 5.

The cornerstone of the collective guarantee of protection of these "beacon" rights was the establishment in the ECHR of a Commission for Human Rights and a Court of Human Rights.[44] Although member states agreed that acceptance of the compulsory jurisdiction of the Court of Human Rights would be an option open to member state acceptance rather than an obligation, by 1959 the option had received the required amount of state ratifications to begin functioning.[45] As discussed below, this option has now been so overwhelmingly accepted by member states that it has become a *de jure* prerequisite to membership for prospective member states.[46]

Similarly, the member states acceded to a state-to-state complaint system for rights violations. The novelty of this system lay in the fact that a state may initiate a complaint without any actual violation of rights. In this way, member states may act as sentinels with regard to treaty obligations through a mutually supported and enforced observance mechanism. As a consequence, this provision allows member states to directly involve themselves in what were once strictly matters of domestic jurisdiction,[47] a measure which has proven effective, although rarely used.[48] Again, acceptance of this method of inter-state scrutiny is now a *de jure* prerequisite to membership.

Even though the Council's successful establishment of a Court of Human Rights with compulsory jurisdiction and of a state-to-state complaint system were cause for celebration among rights proponents the world over, the most judicially meaningful accomplishment made in the adoption of the ECHR was in the contentious dominion of individual petitions. The ECHR provided the first ever international legal remedy attributed directly to an individual rather than to a state for the infringement of an

---

[44]Robertson and Merrills, *supra* note 38 at 8.

[45]*Ibid.* at 14.

[46]As with all of the *de jure* prerequisites, actual practice requires that at accession the prospective member state sign the ECHR, the Protocols and other related documents such as the European Convention Against Torture, the Charter on Local Self-Government and the Framework Convention on Protection of National Minorities, with specific timetables for ratification negotiated on other issues. In the case of Russia, for example, it was required to sign the ECHR at the moment of accession, to ratify Protocols 1, 2, 4, 7 & 11 within one year and to sign Protocol 6 within one year of accession with three years provided for ratification: see, Bowring, *supra* note 23 at 636-37. In this manner, ratification of most instruments is made a condition subsequent to membership rather than a condition precedent.

[47]With regards to the newly independent states, Europe, the U.S.A. and Canada this concept is now firmly a part of history. At the 1992 Helsinki Summit of the Conference on Security and Co-operation in Europe these states resolved to endorse the 1991 Moscow Conference declaration on the human dimension: to "categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the state concerned"; Maria Amor Martin Estebanez, "The OSCE and Human Rights" in Raija Hanski and Markku Suksi, eds., *An Introduction to the International Protection of Human Rights* (Turku, Finland: Institute for Human Rights, Abo Akademi University, 1997) 265 at 272.

[48]The Greek Case (*Denmark, Norway, Sweden, and Netherlands* v. *Greece*) and the Irish Case (*Ireland* v. *United Kingdom)*, both of which are discussed in Robertson and Merrills, *supra* note 37 at 37-8.

individual's rights by a sovereign state.[49] Although as with acceptance of the counterpart device of compulsory jurisdiction, this provision was made an option to the ECHR, it also now enjoys the status of being a *de jure* prerequisite to membership.

In so far as it relates to capital punishment, owing to its early genesis as a result of the immediacy with which the European states were able to agree on a collective articulation of fundamental rights, the ECHR is more conservative than the ICCPR with respect to abolition.[50] Article 3 of the ECHR provides the standard "right to life" protection. Meanwhile, Article 2 provides exceptions to this right under certain circumstances including the effecting of a lawful arrest, the prevention of an escape from custody and the suppression of riots or insurrection. In this the ECHR is the only human rights treaty which provides for exceptions to the fundamental right to life other than through capital punishment.[51] Notwithstanding these deficiencies, it was recently recognized by the Court of Human Rights that this provision "does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice."[52] Among the legal developments exemplifying the Council's progressive nature to which the Court was referring is the fact that by as early as 1983 an Optional Protocol to the ECHR requiring absolute abolition of capital punishment was adopted, seven years in advance of a corresponding provision in the ICCPR.

Further indicia of the progressive stance cultivated by the Council of Europe toward abolition is the fact that Protocol 6 does not allow for reservations to be made to it as is the case with the ICCPR.[53] Ratification of the Protocol demands, *ipso jure*, absolute abdication to its terms. What is more relative to this study though, is the fact that as with compulsory jurisdiction and individual complaints, as outlined below, Protocol 6 has also become a *de jure* prerequisite to membership in the Council of Europe.

The demands made by the Council of prospective member states for acceptance of all of the "optional" mechanisms for enforcement including Protocol 6 may be made in large part because of their near universal acceptance among traditional member states.[54] This widespread acceptance reinforces the unity in purpose underlying the

---

[49]Robertson and Merrills, *supra* note 37 at 8-9.

[50]As Schabas notes, this is certainly an ironic turn given the incomparable progression toward abolition by the Council of Europe since the adoption of either system of rights protection; W. A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Grotius Publications Limited, 1993 at 212.

[51]*Ibid.* at 212.

[52]*Soering* v. *United Kingdom*, Series A, no. 161 11 EHRR 439, as cited in Schabas, *supra* note 49 at 212. See also, Richard B. Lillich, "Harmonizing human rights law nationally and internationally: the death row phenomenon as a case study" (1996) 40 Saint Louis University Law Journal 699.

[53]Article 4, Sixth Protocol, *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966).

[54]See, generally, J.G. Merrills, "The Council of Europe: The European Convention on Human Rights", in Hanski and Suksi, eds., *supra* note 46 at 221.

Convention and membership as a whole such that the ECHR enjoys an unparalleled success as a regional rights mechanism, a success hardly envisioned at the time of the signing of the Statute of the Council of Europe.[55] It is the most fully developed and best observed of all rights treaties,[56] a fact which exemplifies the evolution of a homogeneity in normative values among the European states. Despite their diversity in cultures, religions and languages, today, one can fairly make the claim that the member states of the Council now share "similar economic, political, social and legal cultures" in far greater proportion relative to any other collection of states.[57] What remains to be seen is whether the expectations made of new member states to integrate with this homogeneity through complete reception of the ECHR can be realized.

c. In the "Midst of the Free Countries" - Membership in the Council of Europe

With the movement toward greater openness among Central and Eastern European states in the mid-1980's, the Council of Europe seized the opportunity to embrace these changes. "*Rapprochement*" it said, "had at last become not only possible but necessary."[58] Categorically rejecting the notion of compromise among its values in assisting these states in reform, the Council's new purpose was stated to be "to support this trend, to help make it irreversible, and to fulfill the expectations of the countries calling upon it for assistance. Not of course by renouncing its principles but, on the contrary, by making them a precondition for any form of co-operation."[59]

In 1989, the Council's Parliamentary Assembly established selective special guest status for the national assemblies of countries willing to accept the Helsinki Final Act[60] and the United Nations' ICCPR. This special guest status was extended to Hungary, Poland, the USSR and Yugoslavia. Building upon this success and the fall of the Berlin Wall, the Secretary of the Council of Europe stated on 23 November, 1989 that the Council was the only organisation capable of encompassing all the countries of Europe, once they had adopted democratic rules. In this the Secretary took the opportunity of

---

[55]Kay, *supra* note 17 at 217.

[56]Merrills, *supra* note 54 at 221.

[57]Heffernan, *supra* note 40 at 85.

[58]Available at Council of Europe website http://www.coe.fr/eng/present/history.htm (date accessed: 14 December 1997).

[59]Available at Council of Europe website: http://www.coe.fr/eng/present/history.htm (date accessed: 14 December 1997).

[60]The Conference on Security and Co-operation in Europe led to the adoption of the *Final Act of Helsinki* (1975) which in 1995 led to the Organization for Security and Cooperation in Europe; see Estébanez, *supra* note 46.

enhancing the Council's reputation by announcing a leadership role for it in the Western states' assistance to the transition process.[61]

Accordingly, the Council launched a host of new programs to assist in the democratization process unleashed upon the region, a measure consistent "with its new-found role of offering a home to all the countries of Europe willing to opt for democracy, thereby establishing a continent-wide democratic security area... ."[62] At the Vienna Convention of 1996, the Council reiterated its claim to be the only association capable of comprising all of these nations under one umbrella of security and co-operation. At this conference it restated its resolve not to compromise its fundamental principles in the movement toward greater membership. Rather, it said that accession to the Council by Central and Eastern European states was entirely premised on acceptance by these states of those very same founding principles:

> Such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people's representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the European Convention on Human Rights and accept the Convention's supervisory machinery in its entirety within a short period is also fundamental. We are resolved to ensure full compliance with the commitments accepted by all member States within the Council of Europe.

Thus, in the domain of human rights, membership in the Council is predicated on the applicants' acceptance of the full supervisory machinery, including both inter-state and individual petitions, and compulsory jurisdiction of the Court of Human Rights.[63]

As regards abolition, the Council has taken a stern position. It has declared that prospective member states must accept the ECHR in its entirety:

> With reference to Resolution 1044 (1994), the Assembly reminds applicant states to the Council of Europe that *the willingness to sign and ratify Protocol 6 to the European Convention on Human Rights and to introduce a moratorium upon accession has become a prerequisite for membership of the Council of Europe* on the part of the Assembly. It thus recommends applicant states to review their policy on capital punishment in time.[64]

---

[61]Available at Council of Europe website: http://www.coe.fr/eng/present/history.htm (date accessed: 14 December 1997).

[62]Available at Council of Europe website: http://www.coe.fr/eng/present/history.htm (date accessed: 14 December 1997).

[63]Kay, *supra* note 17 at 218.

[64]Resolution 1097 (1996) on the abolition of the death penalty in Europe, available at http://stars.coe.fr/ta/ta96/eres1097.htm (date accessed: 10 December 1997) (Emphasis added).

This precondition to membership is intended not only to foster a new culture of respect for life among the new member states but to reflect a *de facto* state of affairs among existing members.[65] While time is allocated to these states to govern themselves according to their treaty obligations, in the case of most applicant states absolute abolition by ratification of Protocol 6 is expected within, at most, three years from the date of accession. Further, in the interim between accession and ratification, a complete moratorium on executions is also "urged" upon applicant states.[66]

In reasserting its continued commitment to the ideal of abolition and the extension of this principle to the Central and Eastern European and CIS states, the Council held a seminar on the death penalty in Kiev, Ukraine in late 1997. The declared aim of this seminar emphasized the uncompromising position of the Council in the face of opposition to the acceptance of abolition. The seminar, it was said, was "to help the countries which want to abolish the death penalty and which undertook to do so when joining the Council, to press ahead despite the opposition from public opinion, key ministries or senior officials."[67] One might be tempted to ask, absent senior officials, key ministries and the public, just who it is that is expected to be left in these societies to support the measure.

Notwithstanding the strict requirements for membership, by 1997 the Council of Europe had expanded from its original ten members to include forty states.[68] This group includes the newly independent nation of Estonia which joined the Council in 1993, and it accordingly undertook to satisfy the prerequisites.

Beyond the prodigious success it may enjoy in the expansion of its membership rolls, the Council of Europe's achievements in the ECHR extend beyond the boundaries of its' own institutions. The ECHR and the decisions of the European Court of Human Rights provide meaningful legislative and judicial precedent on human rights issues to a number of jurisdictions the world over,[69] most significantly within the institutions of the European Union. Not surprisingly, given that many of the same states are members

---

[65]At the time Resolution 1097 was adopted, only Turkey, the United Kingdom, Malta and Cyprus had legislation which provided for the death penalty without taking recourse to the sentence. Information available at Council of Europe website: http://www.coe.fr/eng/present/history.htm (date accessed: 14 December 1997).

[66]S. Parrish, "Council of Europe criticizes Russia, Ukraine on death penalty" (12 June 1996) OMRI Daily Digest.

[67]Kyiv Seminar: Introduction, available at http://stars.coe.fr/act/file/kyiv/asem%5Fintro.htm (date accessed: 10 December 1997).

[68]The 40 member nations of the Council of Europe at the time of writing are Albania, Andorra, Austria. Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the Former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom.

[69]See for example, Lillich, *supra* note 52.

in both institutions, the Council of Europe sees itself as having a significant partnership with the EU especially in regard to "the development of joint projects, notably in favour of the countries of Central and Eastern Europe."[70]

d. The ECHR and the EU

For the last forty years the international community has continually relied on the Universal Declaration of Human Rights as the definitive embodiment of human rights norms. As a result, today the Declaration is, arguably, not only an authoritative interpretation of the United Nation's Charter duties for states to uphold, but a basic component of international customary law,[71] possibly even a modern dynamic of general principles of law, or *jus cogens*.[72] Interestingly, a similar, parallel evolution has occurred within the EU's treaty law as regards the status of the ECHR. As a consequence, for prospective members of the EU it is not only the Council of Europe's position toward the ECHR which must be of concern. Prospective EU Member States must have a clear cognizance of the role of the ECHR in the EU treaty law and its implications for municipal law.

As stated earlier, attaining the ultimate purpose of the European Union, that of a peaceful, united federal Europe, has been predicated on full economic integration in a supranational institution as a first step. Logically this first step has demanded the creation of a comprehensive body of legislation in nearly every economic field and a planned expansion of fields of application for the *acquis communautaire*: the existing body of laws of the European Union.[73] The *acquis*, or, community law, is directly applicable within all member states. According to the European Court of Justice, "the Member States have limited their sovereign rights .... and have thus created a body of law which binds both their nationals and themselves."[74] Through the "direct effect" doctrine Member States are obliged to ensure that community law is given "direct effect" within municipal legal systems, and the "supremacy" doctrine which ensures that the *acquis* prevails over municipal law.[75] Failure to abide by this doctrine may

---

[70]Available at Council of Europe website: http://www.coe.fr/eng/std/viennad.htm (date accessed: 10 December 1997).

[71]See generally, J.E. Noyes, ed., *The United Nations at 50: Proposals for Improving Its Effectiveness* (American Bar Association, 1997) at 177.

[72]See generally, B. Simma and P. Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1992) 12 Australian Yearbook of International Law 82, and also, Hannum, *supra* note 3.

[73]Tilloston, *supra* note 30 at 226.

[74]*Costa* v. *ENEL*, (1991) ECR, p. 6102, para. 21.

[75]See, Bronitt, *et al.*, *supra* note 9 at 128-46.

result in a member state's liability for failing to live up to its treaty obligations.[76] The obligations subsumed under theses doctrines rest with the national authorities of the Member States including national courts as the first level of judicial consideration of the *acquis*. According to the ECJ, the final arbiter of disputes under the EU treaties, "[e]very national court in the European Community is now a Community law court. National judges have a duty, in common with the European Court of Justice, to see that Community law is respected in the application and interpretation of the Community Treaties".[77] This system provides a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal entities, both public and private.[78] In sum, the EU treaties now constitute a veritable constitutional order.[79]

Strictly speaking, within this supranational constitutional order the ECHR does not qualify as a "European Treaty" for the purposes of the Treaty of Rome. By virtue of Article 164 of the Treaty though, in its interpretation and application of the Treaty, the European Court of Justice must uphold and apply the general principles of law. In discharging this duty, the ECJ has, since 1969, held that respect for human rights forms part of the legal traditions of the member states and, as such, must also form part of the Union's legal order as general principles of law.[80] In determining the meaning and content of these general principles of law as endorsed by the common constitutional orders of its member states, the ECJ has since this time continually and with increasing

---

[76] *Francovich* v. *Italian Republic*, [1991] ECR I-5357; [1993] 2 CMLR 6, and *Brasserie du Pecheur and Factortame III* (1996), 1 CMLR 889, which expanded non-contractual liability of the member states for non-implementation to cover community law in general: see, Kari Joutsamo, *Legal Principles in Community Law After the Treaty of Amsterdam 1997* (Helsinki: Helsinki Yliopisto, 1997) at 5-6.

[77] J. T. Lang, "The Duties of National Courts Under Community Constitutional Law" (1997) 22 ELR 1 at 11. The ECJ has held that legitimacy for this supranational quality of EU power lay in the voluntary decisions of the member states to transfer their sovereign Union; see Patrick Tangney, "The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany" (1996) 21 Yale Journal of Int'l Law 395 at 409, citing Case 26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belanstingen* (1963), ECR 1. See also, *Stoke on Trent City Council and Norwich City Council* v. *B & Q plc*, C-169/91: "The Treaty of Rome is the supreme law in this country, taking precedence over Acts of Parliament. Our entry into the Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on matters of social and economic policy."

[78] Although consistent with international legal obligations, the primacy EU obligations enjoy over municipal law, and their continual augmentation through the "deepening" of the Union consequent upon the implementation of the *Maastricht* and *Amsterdam Treaties*, is incomparable to any other international organisation; R. J. Goebel, "The European Community and Eastern Europe: Deepening and Widening The Community Brand of Economic Federalism" (1993) 1 New Europe Law Review 163. See also, Tangney, *supra* note 77 at 410.

[79] The European Court of Justice has referred to community law as such in Opinion 1/91, EEA I, (1991) ECR, p. I-6079. See, among many articles devoted to this topic, "Special Issue on Sovereignty Citizenship and the European Constitution" (1995) 1 European Law Journal 219-307, and Richard Bellamy, ed., *Constitutionalism Democracy and Sovereignty: American and European Perspectives* (London: Avebury, 1997).

[80] *Internationale Handelsgesellschaft* v. *EVG*, [1970] ECR 1125, para. 4, [1972] CMLR 255.

incidence relied on the terms of the ECHR.[81] Consequently, the application of the ECHR has enlarged from a document for internal and supra-state supervision for member states of the Council of Europe to provide a form of overarching normative principles governing the construction of EU principles and determining the validity of EU provisions themselves.[82]

This practice by the ECJ was validated with the continued expansion of the European Union in the TEU, otherwise known as the *Maastricht Treaty* and again with the *Treaty of Amsterdam* 1997. Article F(2) of the *Maastricht Treaty* refers to respect for fundamental rights, as guaranteed by the ECHR, and all of its Protocols, and as expressed in the constitutions of its member states, to form part of the EU's *acquis communautaire*. The *Treaty of Amsterdam* which revised the existing Treaties, took this further by incorporating the principles of liberty and democracy in the text of EU articles and by making basic human rights legal rules the persistent breach of which could lead to the expulsion of the Member State concerned. Further, a second role for these principles was included in the *Amsterdam Treaty* with specific regard to the prospective Member States of Eastern Europe. An addition to Article O of the *Treaty on European Union* (which now becomes Article 49 of the Treaty) now mentions the respect for fundamental human rights as a condition for new applicant European States becoming Member States such that "an existing *de facto* political condition for membership has now been changed into a judicially relevant condition for membership."[83] Consequently, as the ECHR now forms part of the *acquis*, it is effectively binding on the ECJ and domestic courts also as "courts of the Union" to enforce the ECHR and all of its Protocols in so far as they constitute general principles of law.[84]

We may conclude therefore that the supranational order of the EU is fundamentally imbued with the meaning and content of fundamental rights and duties as outlined in the ECHR complete with Protocol 6 and its absolute ban on capital punishment. What is more, from the revisions to the Treaty undertaken in Amsterdam, it would appear that the EU has these considerations foremost in their minds when considering expansion to include any of the newly independent states of Eastern Europe.

---

[81]A.W. Bradley and K.D. Ewing, *Constitutional and Adminstrative Law*, 11th ed. (New York: Longman, 1993) at 424.

[82]*Ibid.* at 424.

[83]Joutsamo, *supra* note 76 at 12.

[84]To give more intelligible meaning to Article F(2) and to formalize a *de facto* state of affairs, there was a movement within the EU in support of a more efficient means of ensuring respect for human rights in EU activities by having the EU accede to the ECHR and subject itself to the jurisdiction of the European Court of Human Rights. In a reference case the European Court of Justice was of the opinion that the EU did not have the competence to do so: Opinion 2/94, ECHR, 28.3.1996. See Noreen Burrows, "Question of Community Accession to the European Convention Determined" (1997) 22 European Law Review 58 at 58.

e. EU Membership for Central and Eastern European States

The desire by Central and Eastern European States to join the European Union after the Cold War was not unexpected. Even prior to the fall of the Berlin Wall Germany had begun to expand trade links with Eastern European states. With the fall of the Wall though, this German policy took on unexpected dimensions with the prospect of a reunified Germany suddenly looming on the horizon. For the EU, it recognized that it stood to benefit by expanding to include these countries:

> Enlargement to include the countries of Central and Eastern Europe and Cyprus is a historic challenge for the Union. But it is also an opportunity - in terms of its security, its economy, its culture and its place in the world. The continent-wide application of the model of peaceful and voluntary integration among free nations is a guarantee of stability. The Union, with more than 100 million new citizens, will see enhanced trade and economic activity, and a new impetus for the development and integration of the European economy as a whole. Europe's cultural diversity will be a source of creativity and wealth. The accession of new Member States will enhance the Union's weight and influence internationally.[85]

Even though the EU is aware that by immediate expansion to include all of these countries, its total GDP would expand by only 5%,[86] it is regional stability which provides long term greater potential for market economies. As well, the EU is very cognizant of the potential for enhancing its' international influence on this renewed membership basis. Subsequently, they immediately established a program for assisting reform specifically for those countries which, at the time, had the best prospects for successful transition.[87]

Early on in this process the European Commission was given the task of setting down the guidelines for membership for prospective Central and East European states. These criteria were reported by the Commission in its opinion delivered at the Copenhagen European Council in June 1993. The Conclusion of this meeting was that those countries which desired to become EU members must satisfy the following criteria:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities

---

[85]Available at http://www.eurunion.org/legislat/agd2000/index.htm (date accessed: 10 December 1997). NOTE: Presumably, "all of these countries" means the ten countries which have made formal applications for membership rather than all of the countries of the region, thus, the 100 million population figure.

[86]Available at http://www.eurunion.org/legislat/agd2000/index.htm (date accessed: 14 December 1997).

[87]The first such program was the PHARE (French for "lighthouse") Program - Poland Hungary Assistance for Reform of Economies, which has since this early period had its mandate and budget dramatically increased: see Bronitt, *et al.*, *supra* note 9 at 190.

- the existence of a functioning market economy, as well as the ability to cope with competitive pressures and market forces within the Union
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

The Commission noted that a judgment on these three groups of criteria, political, economic and the ability to take on the *acquis communautaire*, would depend on the capacity of a country's administrative and legal systems to put into effect the principles of democracy and the market economy and to apply and enforce the *acquis* in practice. In regard to the political conditions for membership, the EU is of the opinion that to ensure observance of human rights and the rights of minorities, various international conventions are applicable, above all of which, is the ECHR and its main additional protocols. The EU has declared, that "[i]n accordance with Article F of the TEU, this collection of texts forms part of the *acquis*: any country wishing to join the Union must have ratified them."[88]

The pre-accession strategy adopted by the European Council at Essen in December 1994, was aimed at creating mutual confidence through a framework ("structured relations") of regular, well-prepared contacts with the associated countries which had signed "Europe Agreements".[89] These Europe Agreements are not simply related to economic association, trade relations and financial co-operation but rather, include provisions for political and cultural dialogue and co-operation.[90] Ten countries of the region signed Europe Agreements as official applicants for admission to the EU.[91] These applications are regarded by the EU "as part of a historic process of ending the division of Europe and consolidating the establishment of democracy across the continent".[92]

The White Paper of May 1995 followed by setting out a program for the obligations to be met by prospective states regarding their internal markets. Further, the White Paper described structures for the implementation of the legislation necessary for

---

[88]Agenda 2000, Commission Opinion on Estonia's Application for Membership of the European Union, available at http://www.eurunion.org/legislat/agd2000/index.htm (date accessed: 10 January 1998).

[89]For information on the "Europe Agreements", see Goebel, *supra* note 78 at 218-23.

[90]H. Kramer, "The European Community's Response to the 'New Eastern Europe'" (1993) 31 Journal of Common Market Studies 213, as cited in Bronitt, et al., *supra* note 9 at 192.

[91]See, "Let battle commence", *supra* note 16.

[92]They have also been referred to "as part of the emerging new 'European Architecture'"; Kramer, *supra* note 90 at 193.

ensuring effectiveness of the Europe Agreements,[93] effectively, the first concrete steps to economic union.

On July 16, 1997, the European Commission released its opinions on the ten applications for EU membership from Central and Eastern Europe, with documents outlining the "Agenda 2000" program for EU expansion. Agenda 2000 confirmed that five countries of Central and Eastern Europe are to be candidates for admission to the EU in the year 2000. Along with Poland, the Czech Republic, Hungary, and Slovenia was the newly independent Estonia. The inclusion of Estonia among the first wave of expansion was officially endorsed by the EU Council of Ministers in Luxembourg on 12 December 1997, thereby paving the way for official integration to proceed.

f. Conclusions on EU and Council of Europe Membership

From the foregoing, there is an apparent unequivocal resolve within both the Council of Europe and the EU in demanding strict adherence to the prerequisites to membership including observance of Protocol 6. There is also a determined effort being made by the EU and the Council of Europe to ensure that these states are successful in the transition process. This is because successful transition by the newly independent states and adoption of the values which are at the very heart of the EU and the Council is perceived to be simply the logical extension of the original shared mandate of these groups, ensuring a peaceful Europe through political and economic union based on common founding principles.

The European community at large stands at a critical juncture. The benefits of successfully delivering the newly independent states into its fold are immense. Widespread acceptance of the normative values of an international human rights culture could ensure long term prospects for peace and prosperity among both Western nations and these newly independent states. For the EU in particular, it stands to increase what is already becoming a considerably strengthened role in international affairs.[94] If unsuccessful, the ECHR, and the supranational institutions of Europe, potentially stand to suffer an ignominious defeat in the resurgence of the values they had opposed for so long. While this seems unlikely, so too did the fall of the Berlin Wall.

---

[93]"White paper on preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union", available at http://europa.eu.int/en/agenda/euwh.html (date accessed: 10 December 1997).

[94]Consider, for example, the recent Kyoto Conference where EU Ministers of the Environment forced the United States to accept drastic emissions reduction rates when the latter had stated its resolve to leave the Conference with no cuts: "Rubbing sleep from their eyes" (1997) 345 *The Economist* (Issue 8047) 46 at 47.

Part III - Post-Soviet Restorationism in Estonia

a. Decline of the Empire

When it was seized by the Soviet Union, Estonia had a fully developed industrial economy.[95] This economic status did not change throughout occupation. During this period all of the Baltic nations, but particularly Estonia, were more advanced economically, culturally and socially relative to other Republics.[96] In fact, many Soviet citizens looked to the Baltics as a window to the West as a result of their geographic location, high standards of living and social and cultural distinctiveness.[97] Therefore it is not surprising that these states were the most critical of the perpetual decline in the economic well-being of the former USSR which, by the early 1980's had become all too apparent. Still more abhorrent to these states was the fact that the responses to this economic breakdown, Gorbachev's *glasnost* and *perestroika* initiatives, persisted with the traditional but fundamentally flawed Soviet methodology of top-down reform consistent with decades of a command-control economy.[98]

As a result, of all the Republics, the Baltics were to be the most frustrated by perpetually hopeless economic direction from Moscow and interference with ethnic relations through forced mass immigration of Russian workers. And of all the nationalities well situated to capitalize on these circumstances were these same economically strong and ethnically secure states,[99] paramount among which was the Western looking Estonia.

Throughout the 1980's political movements alternative to the Communist Party had developed. By the late 1980's movements in Estonia and Latvia organised large-scale protests in Riga and Tallinn against both economic and environmental crises.[100] But the most significant event to occur in the region was the occasion of the 50th Anniversary

---

[95]See generally O. Norgaard, *The Baltic States after Independence* (Brookfield: Edward Elgar Publishing Company, 1996) at 122-168.

[96]J.J.A. Burke, "The Economic Basis of Law as Demonstrated by the Reformation of NIS Legal Systems" (1996) 18 Loyola of Los Angeles International and Comparative Law Journal 207 at 227 where Burke notes that Estonia had a 40% higher GDP than other Republics during the Soviet period.

[97]*Ibid.* at 227.

[98]J. Hiden and P. Salmon, *The Baltic Nations and Europe, Estonia, Latvia and Lithuania in the Twentieth Century* (New York: Longman, 1995) at 147.

[99]*Ibid.*

[100]The latter actually resulted in the blocking of a Soviet Central Authority plan to open a large phosphate mine in north-eastern Estonia; see Rein Taagepera, *Estonia: Return to Independence* (Boulder: Westview Press, 1993) at 120, and Hider and Salmon, *supra* note 98 at 149. Also, it is interesting to note that as early as 1990 a Russian Professor of Law at the University of Tartu, and a Member of the Supreme Soviet of the USSR, was calling for a constitutional court for Estonia with the rule of law maintained through a constitution over political power, a direct challenge to prevailing Marxist/Leninist state practise: see Igor Gryazin, "Constitutional Development of Estonia in 1988" (1990) 65 Notre Dame Law Review 141.

of the Molotov-Ribbentrop Pact of 1939.[101] On the 23rd of August, 1989, over one million people joined to form a human chain stretching from the Gulf of Finland to Southern Lithuania. "The Baltic Way", a combination of the three popular front movements of the three Republics who spurred the event, issued a joint statement calling for the restoration of Baltic statehood.[102] These events presaged the rise of nationalist demands for greater autonomy throughout the USSR and forced the issue squarely into the lap of the Soviet leadership.

On 30 March 1990 the Estonian Supreme Soviet, now controlled by Estonian nationalists, issued a declaration of Estonian sovereignty. The Soviet Union leadership responded to this and similar declarations in the other Baltic states with economic and military action. The breaking point in a tense standoff came first when the Russian Republic, under Boris Yeltsin, recognized the Baltics as sovereign states. This was followed by the attempted coup in Moscow, during which Estonia and Latvia declared their full independence, and were almost immediately followed by the Republic of Moldova.[103] With this break, other Republics soon joined the frenzy toward independence. And with recognition of Baltic independence by the Russian Parliament, the Ukraine, and several Western nations, the Supreme Soviet had no choice but to concede defeat. Subsequently, on 6 September 1991 the USSR recognized Estonian independence.[104] Even though they constituted only a tiny portion of the total population of the USSR and a negligible part of the territory, the role of the Baltic Republics in the breakdown of the USSR can hardly be overestimated.[105]

With independence, the Baltic states immediately set out upon a comprehensive program of reform. No doubt this program of action was, in large part, spurred on by a fear of a regaining of composure and strength in Moscow. It is likely that there was a sense of self-preservation to this effort by putting as much distance as possible between themselves and their former suppressers. In Estonia, this program of reform had the following centralizing themes: the establishment of a liberal democracy with a free market economy, the achievement of an internationally recognized independence

---

[101]The Molotov-Ribbentrop Pact between the USSR and Germany of 1939 was, to all outward appearances, a mutual non-aggression pact. However, in a secret protocol which was part of this Pact, the two sides divided most of Eastern Europe and Finland into individual "spheres of influence". As poor fortune would have it for Estonia, under the terms of this protocol the Baltic states were once again returned to the Soviets (the Bolsheviks had held control over the country between 1917 and 1918 and the Soviets had tried to seize the country after World War I). Despite a brief respite from Soviet rule during the Second World War with occupation by the German Army, upon the defeat of the Nazis the USSR re-asserted its claims to Estonia stating that its earlier annexation in 1940 had been legal; Visek, *supra* note 11 at 319-20.

[102]Taagepera, *supra* note 100 at 156-58.

[103]Visek, *supra* note 11 at 322-23.

[104]*Ibid.*

[105]K. Gerner and S. Hedlund, *The Baltic States and the End of the Soviet Empire* (New York: Routledge, 1995) at ix.

based on the proclamation of national self-determination of 24 February, 1918 and the principles of *ex iniuria jus non oritur* combined with legal continuity[106] premised on the 1938 Constitutional order; a defined territory based on the 1920 Treaty of Tartu's delineation of borders; and, in a general sense, reunification with the Western world especially with Europe in all respects possible.[107]

In one of its first steps toward a revitalized independence, in accordance with the Estonian Supreme Soviet's resolution on resumption of independence, a Constitutional Assembly was created to draft a new constitution.[108] After much debate, a draft constitution was developed modeled on the western liberal democratic conception and drawing much of its inspiration from the German Constitution. This constitution was adopted by a popular referendum on 28 June 1992 with the support of 91.2% of the 66.3% of eligible voters who participated.[109] As Taagepera notes, "[a]doption of a constitution did not make Estonia's social and economic problems go away but it supplied a political framework for solving them at a time when most neighbouring countries (such as Russia) continued to be plagued by the absence of such a framework."[110]

Internationally recognized statehood was soon accomplished with recognition by Western states. [111] And, consistent with its claim of re-emergence from a statehood emerging from a state of suppression, Estonia declared that it was not a successor state to the USSR and notified the Secretary of the United Nations that it would not abide by any documents, treaties, conventions, agreements or otherwise, as such. [112] Accordingly, Estonia set out to (re)dedicate itself to most of the United Nations major treaty commitments in its capacity as a sovereign signatory state.

The principle goal of post-Soviet Estonia's foreign policy, one described as "multilateral", was to "develop a wide range of international connections in order to

---

[106]i.e. illegal acts do not create law. In other words, because the Soviet occupation was illegal the consequences of occupation cannot be lawfully recognized internally nor externally as in, by other states. Consequently, Estonian statehood did not cease but was only suspended during occupation: see, Visek, *supra* note 11 at 326-28.

[107]T. U. Raun, "Post-Soviet Estonia, 1991-1993" (1994) 25 Journal of Baltic Studies 73 at 76.

[108]R.Taagepera, "Estonia's Constitutional Assembly, 1991-92" (1994) 25 Journal of Baltic Studies 211 at 211.

[109]For discussion on the issue of Estonian citizens and voter "eligibility", see Visek, *supra* note 11. The referendum resulted in adoption of *The Constitution of the Republic of Estonia* (Riigi Teataja 1992, No. 26, Art. 349), Taggepera, *supra* note 108 at 211.

[110]Taagepera, *supra* note 108 at 228.

[111]Visek, *supra* note 11 at 328-29.

[112]See J. Klabbers, "State Succession and Reservations to Treaties", in J. Klabbers & R. Lefeber, eds., *Essays on the Law of Treaties* (Netherlands: Kluwer Law International, 1998) 107 at 112.

escape dependence on a bilateral relationship with Russia."[113] With this objective in mind, the primary connections sought by the new state were the Conference on Security and Co-operation in Europe, the Council of Europe, and the Council of Baltic Sea States.[114] Since this early period however, with its unparalleled success in transition relative to other former Soviet Republics, the principal objective of the nation has become membership in the European Union.

Paradoxically, for a nation so driven to achieve sovereign statehood, membership in the supranational European Union is now "a cornerstone of the Baltic states' return to Europe," because, it alone, "offers the symbolic and material resources to leave the other union, of Soviet socialist republics, behind once and for all."[115] Compared to the EU, membership in the Council of Europe and the OSCE are viewed as complementary organizations.[116] Although it entails concessions on sovereignty in many policy areas, Estonian political elites are almost unanimously in favour of EU membership because it "provides resources for state-building, thus, enhancing sovereignty and, by extension, security."[117] In the context of post-Soviet Estonia, security may be conversely read as meaning protection from Russia.[118] As the Russian public so recently "honoured" Estonia by naming it Russia's "number one enemy"[119] this is not difficult to appreciate.

b. Monist States One and All

> Constitutional provisions relating to the rights and liberties of citizens are to be interpreted and applied in accordance with the Universal Declaration of Human Rights and with any other treaties to which Romania is a party.[120]

Among the new constitutions of the newly independent states there is a striking similarity regarding the relationship between the municipal legal systems and

---

[113]Raun, *supra* note 107 at 76.

[114]Raun, *supra* note 107 at 76.

[115]J. Lofgren, "A Different Kind of Union" (1997) 4 *Transitions* (No. 6) 46 at 46.

[116]*Ibid.* at 51.

[117]In a poll taken in February 1997, 89 % of Estonian political elites were in favour of EU membership, while 91% considered it important to ensure security; *ibid.* at 48.

[118]For a general introduction to security issues in the Baltic region, see Gerard F. Brillantes, "Uncertainty Around the Baltic Sea" (1997) 4 *Transitions* (No. 6) 53. Russia's most recent stance toward the Baltics in general was evident in its vocal opposition to the United States-Baltic Charter, a form of pre-, or alternative NATO membership association which extends the Partnerships for Peace initiative. Russia response's to this initiative was vocal opposition using rhetoric reminiscent of the height of the Cold War; see "Club or be clubbed" (1998) 346 *The Economist* (Issue 8051) 46.

[119]See Visek, *supra* note 11 at 325.

[120]Articolul 20, *Constitutia Romaniei*, Bucuresti, 1991 (Constitution of Romania: Author's translation).

international law. This similarity lay in the very deliberate and nearly universal reconfiguration of constitutions to make the legal systems of these states subservient to international legal principles,[121] and to ensure that international commitments by the nation are immediately secured through adoption by municipal legal systems. This latter purpose is referred to as the adoption of a monist approach to international law.[122]

The Estonian Constitutional order very explicitly adopts a monist stance. Article 3 of the *Constitution of Estonia* provides that "[g]enerally recognised principles of and rules of international law are an inseparable part of the Estonian legal system."[123] Further, the Estonian Constitution also provides that the Republic shall not conclude treaties which are in conflict with the Constitution, but, "[i]f laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply."[124] In this manner, the entire body of Estonian law is made subject to self-executing international legal principles as part of the municipal legal system. Further, the provisions of the Estonian legal system themselves are subject to judicial review in accordance with the international obligations undertaken by the Estonian Parliament, the Riigikogu.

The near universal acceptance of this approach to international law and treaty obligations among these incipient democratic constitutions can be understood as a declared commitment to the primacy of international legal principles over domestic law, the purpose of which is to declare a willingness to accept the most stringent of international normative values by making all municipal law submissive to these claims.[125] It is a measure taken to re-assure Western donors of a willingness to institute and abide by liberal democratic values of which it has been said these normative values form an inherent part. In effect, instituting constitutional changes of this nature is the

---

[121]W. Osiatynski,, "Rights in New Constitutions of East Central Europe" (1994) 26 Columbia Human Rights Law Review 111 at 161. But see especially, Eric Stein, "International law in internal law: toward internationalization of Central-East European Constitutions" (1994) 88 American Journal of Int'l Law 427.

[122]A monist state allows for the direct incorporation and the supremacy of the terms of international treaties to which the state is a party as self-executing provisions for immediate use in the state's municipal legal system. Monism, as a theoretical construct standing in diametric opposition to "dualism", is said to represent the relationship between international law and municipal law wherein when the former is said to apply in whole or in part to the latter within a jurisdiction, it is said to be merely an exercise of the authority of the municipal law as an adoption or incorporation of international law. In contrast, dualist theory holds that the two fields of law regulate different subject matter and as such neither has the authority to create or alter the rules of the other. In other words, if a state subscribes to the dualist theory either through its constitution or its legal tradition, its municipal law does not incorporate, let alone provide for the supremacy of any international legal norm unless expressly provided in, for example, a statute under consideration; Ian Brownlie, *Principles of Public International Law,* 4th ed. (Oxford: Clarendon Press, 1990) at 32-57.

[123]The Estonian National Court has recognized that incompatibility of domestic law with European Community Law is a grounds for unconstitutionality: RKO III-4/A-5/94 (30 Sept. 1994). Riigikohtu lahendid 1993/94. Õigusteabe AS Jurra, Tallinn, 1995, lk 34.

[124]Article 123, *Constitution of Estonia*, supra note 109.

[125]Osiatynski, *supra* note 121 at 128.

proverbial hanging out of the "open for business" sign to Western states. The problem with this measure though, is the gulf between theory and reality,[126] a questionable sincerity in making these claims combined with the hopelessly limited capacities to have them realized. In Estonia, the credibility issue in these claims was challenged early on with the recognition that the "de-Sovietization" process in this country would "be characterized by a contradiction between the striving of the new leaders for speedy pro-Western reforms and realities that may hold back their implementation."[127] These realities have come into play in Estonia's drive toward membership in the Council of Europe and the EU.

c. Council of Europe and EU Membership

Consistent with its program for multi-lateral foreign policy and its openness to Western contact, as with most newly independent states, one of Estonia's first steps into the international arena was an application for membership in the Council of Europe. On May 1993, the Parliamentary Assembly of the Council of Europe accepted Estonia's application to become a member state of the Council. This decision was made on the basis of Opinion No. 170, which outlined for the Council what were regarded as the most important expectations of Estonia in acceding to the ECHR.[128] At that time, Estonia had committed itself to signing and ratifying the ECHR, along with recognition of the right to individual petition and the compulsory jurisdiction of the European Court of Human Rights. In the explanatory report to the Opinion, it was considered important for Estonia to honour "the assurance given by the President of Estonia when he took office that there would be no executions during his term and that Estonia would abolish the death penalty as soon as possible."[129] Consistent with these membership obligations, Estonia signed the ECHR and all of its protocols in May of 1993.[130] Consequently, under international law, it could not carry out any executions pending a decision on ratification.[131] In this respect, Estonia has confined itself to its treaty obligations as a

---

[126]See Ludwikowski, *supra* note 5 at 162.

[127]"Constitution Watch" (1992) 1 East European Constitutional Review (No. 3) 1 at 5.

[128]Appendix I to Rapporteur's Report, on the honouring of obligations and commitments by Estonia, 20 December 1996, ADocument 7715, entitled "Extract from the Information report on the honouring of commitments entered into by new member states," Doc. 7080, Addendum IV.

[129]*Ibid.*

[130]See Amnesty International Report 1997, available at http://www.oil.ca/amnesty/ailib/aireport/ar97/EUR51.1 (date accessed: 20 January 1998).

[131]Article 18 of the *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, entered into force 27 Jan. 1980, U.N. Doc. A/CONF. 39/26, reprinted in 8 ILM 679 (1969). See also, Amnesty International Report 1997, *supra* note 130.

moratorium on executions has been in place since signing the Protocol.[132] From this point onward, all that has remained is for the ratification of Protocol 6 by the Estonian Parliament. But this detail has proven troublesome and the process for ratification has emphasised concerns of a larger nature with regard to the integration to a human rights culture.

On 25 May 1995, the Council of Europe passed Order No. 508 which called for a monitoring of member states' progress in honouring its obligations and commitments of which those expected of new member states had been outlined by the Council in Order No. 408 in 1993. Under this more recent Order No. 508, all member states are to observe the rule of law and the enjoyment by all persons under its jurisdiction of human rights and fundamental freedoms and any other specific commitments to which a state committed itself upon accession to the Council with special *Rapporteurs* appointed to monitor each states' progress.[133] Thus, an ongoing oversight program was established to ensure member state compliance with treaty obligations which, for Estonia were contained in Opinion No. 170, and therefore included ratification of Protocol 6.

On 13 March 1996 the Estonian Parliament unanimously ratified the ECHR along with recognition of the right to individual petition under Article 25 of the ECHR and the compulsory jurisdiction of the European Court of Human Rights under Article 46.[134] But, at the same time, it did not submit Protocol 6 for ratification because an apparent overwhelming majority of Estonians favoured its retention.[135] In addition though, earlier in the same year, the Board for Crime Prevention of Estonia concluded that the Criminal Code had to be amended to provide for the sentence of life imprisonment in lieu of capital punishment prior to ratification of Protocol No. 6. Speaking for the Board, the Minister of Justice stated that were this accomplished, ratification could be completed by February of 1997.[136] Apparently distressed by perceived inaction on this matter, in June 1996, the Parliamentary Assembly of the Council called on the Estonian Parliament to abolish the death penalty "as soon as possible".[137] At that time, the special *Rapporteur* noted the following:

> Unfortunately, the Estonian public seems to be against the abolition of capital punishment. During the public discussion, which started on this topic in December

---

[132]At the time of the last report of the special rapporteur to Estonia, the last execution had been carried out in 1991. At the time of this report there were eight prisoners on death row, seven of whom had begun appeals; ADocument 7715, *supra* note 128 at 7. See also, Resolution 1117 (1997) on the honouring of obligations and commitments by Estonia, Parliamentary Assembly of the Council of Europe.

[133]ADocument 7715, *supra* note 128.

[134]*Ibid.* at 6.

[135]S. Girnius, "Estonia opts out of European death penalty ban" (21 February 1996) OMRI Daily Digest.

[136]ADocument 7715, *supra* note 128 at 6.

[137]See Amnesty International Report, *supra* note 130.

> 1995, arguments were raised, that in the time of a high crime rate, it was not a good idea to abolish the death penalty. Taking into consideration that the average salary in Estonia is at approximately 2.800 EEK[138] (the official minimum monthly salary is 680 EEK), and that the maintenance of a prisoner costs between 2.000 EEK and 2.500 EEK per month, many people, especially pensioners, questioned the priorities of the government.[139]

The fact that these citizens felt it relevant to associate the level of salaries with state sponsored executions speaks volumes with regard to the capacity for appreciation of the issue under consideration. Noting these rationales, the *Rapporteur's* report concluded that a massive information and public education program was necessary in Estonia "to convince the public of the futility of capital punishment."[140]

In November 1996, Estonia ratified the European Convention for the Prevention of Torture and announced its intention to ratify the Framework Convention for the Protection of National Minorities in January 1997.[141] On the issue of abolition, in December 1996, the Estonian Parliament took the required measure of amending its criminal code to allow courts to impose a life sentence in lieu of capital punishment. But, at the same time, in defiance of its commitment to the Council, the Estonian Parliament rejected a call to abolish the death penalty as requested by the Council's Parliamentary Assembly.[142] This commitment had been re-affirmed by the Estonian Minister of Justice on February 19, 1996, and by parliamentary delegations to the Council on 17 April 1996 and again on 2 December 1996.[143]

Notwithstanding inaction on abolition, following the third report by the *Rapporteur* overseeing Estonia's commitments, overriding vociferous objections by the Russian delegation,[144] the Parliamentary Assembly of the Council passed a Resolution 1117. This Resolution states that "[c]onsidering that the most important obligations and commitments have been honoured by Estonia, the Assembly has decided to close the monitoring procedure opened on 29 May 1995 under Order No. 508"[145] despite that it had earlier stated in Opinion 170 that one of the important obligations for Estonia was the abolition of the death penalty. At the same time, the Assembly resolved to continue

---

[138]Author's Note: In December of 1997 the EEK or Estonian Kroon was traded at approximately 14.1 to 1 USD, or 9.8 to 1 CDN.

[139]ADocument 7715, *supra* note 128 at 6.

[140]*Ibid.* at 7.

[141]See Resolution 1117, *supra* note 132.

[142]Amnesty International Report, *supra* note 130.

[143]Resolution 1117, *supra* note 132.

[144]S. Parrish "Moscow criticizes Council of Europe on Estonia" (5 February 1997) OMRI Daily Digest.

[145]Article 9 of Resolution 1117, *supra* note 132.

following developments in Estonia particularly with regard to, among other matters, abolition. The Council allowed Estonia one year to finally ratify Protocol 6, setting a deadline of 1 February 1998, a commitment to which Estonia agreed.[146] In assisting this renewed commitment, in Resolution 1313 the Assembly offered assistance including financial means, "and advice from the Council of Europe to the Estonian Ministry of Justice to organise a public information and education campaign in favour of the abolition of capital punishment".[147]

In its final report, the *Rapporteur* noted that recommending closure of the monitoring process was contingent upon Estonia's continually declared commitment to honour its obligations: "It is understood that, should certain conditions, such as the ratification of Protocol 6 of the ECHR, not be met within one year from the adoption of this resolution, or significant developments in other fields lead to legitimate concern that Estonia is not honouring its obligations and commitments, the Assembly will re-open its monitoring procedure at that time."[148]

On 3 February 1998, it was reported in *Postimees*, an Estonian national daily newspaper, that Estonia had failed to ratify Protocol 6 by the deadline imposed.[149] According to this report, second reading of the Protocol had been suspended to provide the political parties time to find a compromise on its passage. The *Postimees* report noted that the Rural Union, the Country People's Party, and the Pensioner's Union parties are firmly against its passage along with individual members of other parties. Meanwhile, the Estonian Human Rights Institute believes that the current Parliament will not ratify Protocol 6 because, "it would be political suicide."[150] Anti Liiv, a Member of the Estonian Parliament and a psychiatrist was interviewed for this *Postimees* article. He stated, that he formerly was in support of capital punishment essentially for economic reasons. "But after listening in Strasbourg during the Council of Europe's Parliamentary Assembly session to the speeches by the only supporter of the death penalty, Vladimir Zhirinovsky, I can't imagine how Estonia could end up supporting him. Abolishing the death penalty is the price which Estonia will have to pay in order to make it into the European family of nations."[151] As is evident in this declaration, Liiv's own turnaround has no premise in an appreciation for the nature of a human rights culture. His abolitionist stance is centred in anti-Russian nationalist politics and the costs Estonia must pay to join Europe. Clearly, there is a fissure

---

[146]*Ibid.*

[147]Resolution 1313, Parliamentary Assembly of the Council of Europe.

[148]ADocument 7715, *supra* note 128 at 17.

[149]T. Rutman, "Urgent action on law needed" (3 February 1998) *Postimees* 5.

[150]The Estonian Human Rights Institute (EIHR) was founded by President Meri in 1992; statute of the EIHR on file with the author. Merle Haruoja, a former prosecutor for the Soviet Republic of Estonia, was appointed Secretary General. The author interviewed Ms. Haruoja on 11 December 1997.

[151]Rutman, *supra* note 149.

between the community of values upheld in Western Europe and those to which states of the newly independent states are able to support, or even comprehend.[152]

Although ratification of Protocol 6 is a prerequisite for membership of the Council of Europe and the European Union, [153] Estonia's membership in both institutions seems never to have been in doubt. In its Agenda 2000 report entitled "Summary and Conclusions of the Opinion of the Commission Concerning the Application for Membership to the European Union Presented by Estonia", it is stated "[t]here are no major problems over respect for fundamental rights.... Estonia presents the characteristics of a democracy, with stable institutions guaranteeing the rule of law and human rights."[154] Estonian officials have recognized that if ratification is not proceeded with shortly, there will be a great deal of pressure exerted upon Estonia from third countries.[155] But EU membership for the country is proceeding without any problems. In fact, most ironically, on 1 February 1998, the very same day that Estonia's deadline had lapsed, the EU's political and economic agreements with the Baltic states took effect.[156] More prophetic still is the fact that again on this same day, it was reported that the United Nations European Economic Commission had predicted that Estonia would be the first East European country to get into the EU.[157]

---

[152]In this respect we may look to the quotations which begin the "Conclusion" section. The first was made by a representative of the Government of Estonia's Human Rights Bureau after an indictment by the U.N.'s Human Rights Committee of Estonia's citizenship policies. In relation to this same incident Visek noted that the Legal Information Centre for Human Rights was openly criticized in the Riikikogu for "anti-state behaviour" for having submitted a report to the Committee, a conclusion seemingly endorsed by the Estonian Institute for Human Rights; see Visek, *supra* note 11 at 343. The author's own experiences with the EIHR correspond with the experiences of Visek which belie not only a continued mistrust of Western institutions and citizens but also a profound lack of appreciation for the most basic principles of modern international law, especially in the domain of human rights. The author interviewed the Secretary General of this agency on 11 December 1997.

[153]On 31 October 1997, Dr. Peter Wilkizki of the German Ministry of Justice noted that in its avis on membership, the EU affirmed that abolition was one of the preconditions for membership in the Union, "and thus for Estonia's continuing inclusion in the first round of enlargement": Dr. Peter Wilkitzki, "The Death Penalty - a Tool of Criminal Policy?" a speech delivered at the seminar, Death Penalty - a Penalty for Society, Estonian Institute for Human Rights, Tallinn, 31 October 1997.

[154]Summary and conclusions of the Opinion of the Commission concerning the Application for Membership to the European Union presented by Estonia, 15 July 1997, available at http://www.vm.ee/features/eu/avis.html (date accessed: 5 December 1997).

[155]Rutman, *supra* note 149. See also, "Estonian official urges speedy abolition of death penalty" (2 February 1998) RFE/RL Newsline.

[156]"Baltic states agreements with EU enter into force" (2 February 1998) RFE/RL Newsline.

[157]*Ibid.*

Conclusion - A Human Rights Culture or Cultural Relativism?[158]

> Estonia is a sovereign state and no one can force us to change our laws.[159]
> - Representative of the Government of Estonia's Human Rights Bureau

> I am in favour of human rights violations, if this human being is a criminal.[160]
> - Sergei Stepashin, former head of the Russian Federal Counter-Intelligence Service

It would be wrong to assume that in failing to abide by its commitments to the Council of Europe and the European Union, Estonia is the pariah of these groups. While there is little doubt that its actions have caused consternation among the preeminent states members, they need not look far for examples of more egregious violations of membership obligations. In some instances, there are staggeringly incomprehensible examples of violations reminiscent of a Soviet-style arrogance. For example, Russia and Ukraine also joined the Council of Europe with the stated aim of satisfying many of the same prerequisites as Estonia, especially ratification of Protocol 6 and a declared interim moratorium on executions by both states.[161] Since becoming a member state and declaring these commitments, the Ukraine has executed at least 329 people, which is said to be more than any other nation in the world except for China. Russia, meanwhile, has executed at least 114 people.[162] Even in the Baltic nations there remains a persistence to use capital punishment as Latvia executed at least two individuals in 1996 and maintains its opposition to abolition.[163] The Council of Europe responded to this information with Resolution 1097. It reaffirmed that agreement to subsequently ratify Protocol 6 remains a prerequisite to membership and condemned the actions of Latvia, the Ukraine, and Russia in this regard and hinted at expulsion. It further called on these states to abide by their membership obligations and to immediately introduce moratoriums on executions. Meanwhile, in Lithuania in early 1997, the Interior Minister called for a reintroduction of the penalty to stem the growth of crime to which

---

[158]See M. J. Perry, "Are Human Rights Universal? The Relativist Challenge and Related Matters" (1997) 19 Human Rights Quarterly 461.

[159]Spokesperson for the Estonian Government's Human Rights Bureau, as cited in Visek, *supra* note 11 at 344-45, in response to the United Nation's Human Rights Committee report questioning Estonia's citizenship policies.

[160]S. Stepashin, former head of the Russian Federal Counter-Intelligence Service, as cited in Bowring, *supra* note 23, where he also notes that "this mode of thought is not at all uncommon among senior Russian officials", at 629.

[161]For Russia's obligations see Bowring, *supra* note 23 at 641, and for Ukraine, Parrish, *supra* note 66.

[162]See, "Legalised murder?", *supra* note 1.

[163]See, Amnesty International, available at http://www.oil.ca/amnesty/ailib/intcam/dp/develop.1 (date accessed: 15 January 1998). As for Latvia, on 12 May 1998 the Latvian national daily *Diena* reported that the Latvian Parliament, the Saeima, again voted to retain the death penalty; Inta Lase, Nellija Locmele, Juris Tihonovs, "Parliament keeps the death penalty" (12 May 1998) *Diena* 1.

the President responded that the punishment had never been legally suspended.[164] In comparison therefore, Estonia's treaty violations hardly register.

Nevertheless, what is most evident from studying the process of expansion toward Eastern Europe by the Council of Europe and the EU is the complete counter-purposes to which the two sides come to the table. For Central and East Europeans, the process is more about political gaming in the interests of economic gain.[165] For some states such as Estonia it is presumed that the end result is a "return to the Western World" of which it so fondly remembers being part.[166] To the rest of Europe, as represented by the Council of Europe and the EU, the central issue is extending the reach of those fundamental values which it has forged into a new European identity including democracy, the rule of law and human rights, so as to secure a peaceful Europe into the future. In other words, the Europe to which many of the newly independent states wish to return no longer exists. What remains is for these states to come to terms with the essence of the family of European states as it is now constituted.

Notwithstanding the gulf between the two groups, it is likely that the prevailing perception in Western Europe is that the fissure can be more effectively sealed through progressive assistance. Accordingly, the Council of Europe appears to have opted for the path of least resistance to offer support for evolution in normative values through education, monitoring and persistent prodding. As for the EU's motivations for continuing with its program of integration, it is widely accepted knowledge within this institution that the Baltic nations' strategic importance is completely out of proportion to their size. This combined with pressure from the Nordic countries to include at least one of the Baltic states among the first round enlargement[167] likely pushed the previously incontrovertible prerequisites to membership to secondary status. Subsequently, the ultimate abolition of capital punishment will be consequent upon further economic integration with Europe and perhaps, a long-term education campaign.

While one could decry the interference of politics and comparative realities in the sphere of preserving heretofore sacrosanct normative values, this is not a realistic perspective. What must be acknowledged is that renewed constitutionalism does not occur in a vacuum. The reality is that at the end of the day, each of these newly independent states must be accepted as having had an extended period of subjugation to an intensely controlling authoritarian order. By necessary implication, that order

---

[164]S. Girnius, "Controversy over death penalty in Lithuania" (15 January 1997) OMRI Daily Digest. In February 1998 it was reported that most Lithuanians oppose abolition: "Lithuanians oppose scrapping death penalty" (2 February 1998) RFE/RL Newsline.

[165]In "upping the ante" in this game, and to attempt to re-assert control over many former republics Russia launched its own human rights convention. The CIS Convention on Human Rights was signed in 1995 by seven of the twelve CIS States; see Bowring, *supra* note 23.

[166]From Lauristin and Vihalemm, *supra* note 10.

[167]"Let battle commence", *supra* note 16 at 22.

wrought tremendous societal changes through the brutualization of entire societies, changes which cannot possibly be undone overnight.

A telling critique of the mentality which arose under Soviet-style totalitarianism is Václav Havel's *Letter to Dr. Gustav Husák* written in 1975, in which he described this mindset as:

> a system of existential pressure, embracing totally the whole of society and every individual, either as a specific everyday threat or as a general contingency...where despair leads to apathy, apathy to conformity, conformity to routine performance...and where each individual is driven into a foxhole of existence...[168]

In this realm Peter Frank concludes that deceit becomes the main form of communication with society. In such an environment there is a gradual erosion of moral standards, which Havel describes as:

> the breakdown of all criteria of decency, and the widespread destruction in the confidence in the meaning of any such values as truth, adherence to principles, sincerity, altruism, dignity and honour.[169]

It is into this environment which are thrust the normative values of the morally homogenous Western European community gift-wrapped in economic integration with the EU. Exorcising the "pernicious consequences of totalitarianism"[170] can hardly be accomplished with the same vitality and vigour as the re-stocking of store-shelves.

If, as the Council of Europe's *Rapporteur* for Estonia concluded, and as supported by the Estonian Institute for Human Rights, the Estonian people are largely against abolition of capital punishment, then one might even ask if it is correct for the EU and the Council to oblige Estonian judges to impose normative claims which do not satisfy Bickel's "obligation to succeed".[171] Ultimately, this may expose the judges and the Estonian legal system to a legitimacy crisis which it may not be able to withstand in a period of economic crisis. It may be more appropriate and beneficial to long term successful reform to proceed through incremental challenges.

---

[168]V. Havel, as quoted in P. Frank, "Problems of Democracy in Post-Soviet Russia" in I. Bulge and D. McKay, *Developing Democracy: Comparative research in honour of J.F.P. Blondel* (London: Sage Publications, 1994) at 287.

[169]Havel, as cited in Frank, *supra* note 168 at 287.

[170] *Ibid.* at 295.

[171]"[T]he court should declare as laws only such principles as will in time, but in a rather immediate foreseeable future - gain general assent": as cited in Bayefsky, *supra* note 20 at 499.

On the opposite side of this equation is the future credibility, integrity and legitimacy of the institutions of the Council of Europe and the EU themselves.[172] The danger in this, of course, is that the pursuit of ratification through engagement may weaken the system as has been said to have occurred within the United Nations rights mechanisms. As Bayefsky observes of that system:

> The large number of ratifications has been accomplished by creating and maintaining a system of implementation which is infirm.... Disrespect for international law is exacerbated by sustaining the false claim that ratification is laudable in itself...The system does not work, at bottom, because it presupposes democratic impulses on the part of states parties which in reality are not shared.[173]

The institutions established by the states of Western Europe now stand at a critical juncture. Should they heed these warnings and keep the drawbridges to Europe raised absent clear and convincing evidence of sustainable rights and respect for life cultures? Or, should they proceed with engagement in the hopes of eventually eradicating the legacy of totalitarianism? The answer to this query is clear. The international community of nations has been offered a critical window of opportunity to reconstitute a sizable portion of the world order premised on those values which it holds as sacrosanct and vital to peace and prosperity. To veer away from engagement would be to surrender those values to the vagaries of chaos. That path is one the international community has traveled down far too often. It is far better for European and North American states in particular to assist in this transition process notwithstanding the difficulties faced in revitalizing not only the legal institutional aspects of these societies but the fundamental civilising components as well. After all, the values which can accomplish this task deserve no less than a continuation of the patient observance and commitment they have enjoyed these last fifty years.

Postscript

On 3 March 1998, in an interview in the Estonian daily *Postimees*, Kristiina Ojulandi, Estonian Ambassador to the Council of Europe warned that there would be a full plenary session of the Parliamentary Assembly of the Council at the end of April in which the monitoring of Estonia could be re-opened as a result of its failure to ratify Protocol 6 by the February deadline.[174] In a surprise announcement on the 16th of March the Estonian Parliament declared that it would hold a vote on ratification on March 18. All indications were that the measure would pass despite opposition from

---

[172]See also Bowring, *supra* note 23 at 643, where he concludes that future integrity of the Council of Europe is only possible through the growth of vital civil societies among these states.

[173]A.F. Bayefsky, "Implementing Human Rights Treaties: The Prognosis After Vienna" (1994) American Society of International Law Proceedings 428 at 435.

[174]"Council of Europe watches abolition" (3 March 1998) *Postimees* 10.

several political parties predominantly representing farmers and pensioners. Leaving no doubt as to the motivations behind ratification, the day before the vote, Daimarüv, Legal Commission Director of the Riigikogu, stated in an interview in *Eesti Päevaleht*, "It is a very important decision because if it fails the Council of Europe can re-establish surveillance over Estonia. This will raise other questions about human rights that Russia will be very interested in. This would be a very negative step for Estonia which wants to join the EU."[175] Despite a poll indicating that two-thirds of Estonian citizens were in favor of retaining capital punishment, the measure passed by 39 votes to 30 with 13 abstentions.

[175]M. Meos, "Estonia cannot allow this vote to fail in the Riigikogu" (17 March 1998) *Eesti Päevaleht* 1.