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## **Origins of Russian Membership in the Council of Europe and the Seeds of Russia's Expulsion**

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**THE LEGAL ORIGINS OF RUSSIAN MEMBERSHIP IN THE COUNCIL  
OF EUROPE AND THE SEEDS OF RUSSIA'S EXPULSION**

JEFFREY KAHN\*

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## INTRODUCTION

This view of the law may be right or wrong; and the law may be wise or foolish in seeking thus to regulate the decisions of states. But, for one devoted to international law, it is not enough to dismiss these issues by saying simply that 'law does not deal with questions of ultimate power.'

– Abram Chayes<sup>1</sup>

The Council of Europe welcomed its thirty-ninth member on February 28, 1996, when the Russian Federation signed the European Convention on Human Rights.<sup>2</sup> Russia ratified the Convention and its legal obligations entered into force on May 5, 1998.<sup>3</sup> This was the culmination of a process that began almost a decade earlier, even before the collapse of the sovereign state to which it is heir, the Union of Soviet Socialist Republics.

The first hints at this relationship, and the difficulties that it would encounter, were voiced by Mikhail Gorbachev, Chairman of the Supreme Soviet and Secretary General of the Communist Party of the Soviet Union. Russian Federation President Boris Yeltsin made the formal application and pursued the process to fruition. But it fell to Yeltsin's handpicked successor, Vladimir Putin, to implement the vast majority of those promises in a bright, though hardly trouble-free, first decade of membership. During that time, Russian legal reform advanced faster and farther than at any other time in Russian history.<sup>4</sup> With tragic irony, however, Putin was also responsible for putting that reform process, and that international relationship, to a brutal death. Autopsies will show how Russia's second decade in the Council weakened the latter's institutions, especially the European Court of Human Rights, while Russia increasingly criticized and abandoned its legal commitments rather than enforce them.<sup>5</sup>

Before attending to the many postmortems of this relationship sure to follow, there are several reasons to study its long gestation. Why do illiberal regimes join international organizations, especially those devoted to the advancement of human rights? Why would such an organization invite such a country to join it? The former question has received theoretical and empirical study.<sup>6</sup> This paper focuses on the role played, *vel non*, by the values that the

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<sup>1</sup> ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES & THE ROLE OF LAW* 4 (1974).

<sup>2</sup> COE Treaty List for the Russian Federation, <https://www.coe.int/en/web/conventions/by-non-member-states-of-the-coe-or-the-european-union?module=treaties-full-list-signature&CodePays=RUS> [<https://perma.cc/8NFW-LLX2>].

<sup>3</sup> *Id.*; see also Федеральный закон от 30 марта 1998 г. N 54-ФЗ «О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней».

<sup>4</sup> See, e.g., Jeffrey Kahn, *The Rule of Law Under Pressure: Russia and the European Human Rights System*, 44 REV. CENT. & E. EUR. L. 275 (2019); Jeffrey Kahn, *The Rule-of-Law Factor*, in INSTITUTIONS, IDEAS & LEADERSHIP IN RUSSIAN POLITICS 159–83 (J. Newton & Wm. Tompson eds., 2010).

<sup>5</sup> See, e.g., Jeffrey Kahn, *The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg & St. Petersburg*, 30 EUR. J. INT'L L. 933 (2019); Kahn, *The Rule of Law Under Pressure*, *supra* note 4.

<sup>6</sup> Irina Busygina & Jeffrey Kahn, *Russia, the Council of Europe, and "Ruxit," or, Why Non-Democratic Illiberal Regimes Join International Organizations*, 67 PROBLEMS OF POST-COMMUNISM 64–77 (2020).

Council of Europe proclaimed in its founding documents, the Statute of Europe, and the European Convention on Human Rights.

The Statute makes preambular reference 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.”<sup>7</sup> There is thus a clear link between the Preamble and Article 3, which similarly requires that every member not only “must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms,” but also must “collaborate sincerely and effectively in the realisation”, *inter alia*, of the ideals and principles that are their “common heritage.”<sup>8</sup> Article 4 further conditions an invitation to join the Council on the conclusion of the Committee of Ministers that the applicant be “deemed to be able and willing to fulfil the provisions of Article 3.”<sup>9</sup>

The Convention’s preamble likewise refers to “the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law.”<sup>10</sup> Ratification of the Convention would thus appear to go hand-in-hand with more than one of the Statute’s Article 3 requirements for membership. *De facto*, this was an accepted practice for nearly every member for the first four decades of the Council’s existence—France being the notable exception.<sup>11</sup> But concerns began to emerge that this link was weakening as the Council eagerly began its eastward expansion in 1989. Five years later, the Parliamentary Assembly felt compelled to declare that “accession to the Council of Europe must go together with becoming a party to the European Convention on Human Rights,” with ratification normally expected within a year after joining the Council.<sup>12</sup> The explanatory memorandum accompanying the draft resolution stated the motive: “[O]ur Assembly wished to reconcile the need to offer the ‘new democracies’ a political perspective rapidly with the difficulties experienced by them in advancing from the dictatorship stage, with all its cultural and social effects, to the stage of pluralist democracy, not to mention the social difficulties.”<sup>13</sup>

This was as much aspiration as confession. The need to provide special help to new members “in advancing from the dictatorship stage, with all its cultural and social effects,” suggested that the spiritual and moral values required for

<sup>7</sup> Statute of the Council of Europe, Article 4, May 5, 1949, Eur. T.S. No. 1.

<sup>8</sup> *Id.* at Art. 3. See also Eckart Klein, *Membership and Observer Status*, in THE COUNCIL OF EUROPE: ITS LAW AND POLICIES §3.11 (Schmahl & Breuer eds., 2017); and Arnold Koller, *The Legal Heritage of the Council of Europe: Its role in reinforcing links with the Countries of Eastern Europe*, 11 HUM. RTS. L.J. 203, 204 (1990) (“[P]luralist democracy, the rule of law, respect for human rights: it is this triad of complementary and indissociable principles which constitutes the originality of the shared heritage to which the Council of Europe member States in the Preamble to the London Statute of 5 May 1949 ‘reaffirmed their devotion.’”) (emphasis in original).

<sup>9</sup> Statute of the Council of Europe, *supra* note 7, at Art. 4.

<sup>10</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble, Nov. 4, 1950, Eur. T.S. No. 5.

<sup>11</sup> France signed the Statute of the Council of Europe as a founding member on May 5, 1949, ratifying it three months later. France was also in the cadre of first signers of the European Convention on Human Rights on November 4, 1950, but ratified the Convention, providing for its entry into force, on May 3, 1974.

<sup>12</sup> EUR. PARL. ASS., *Honouring of commitments entered into by member states when joining the Council of Europe*, 14th Sitting, Res. 1031 (1994) [hereinafter *Honouring of commitments*].

<sup>13</sup> EUR. PARL. ASS., *Political Affairs Committee (PACE) on the honouring of commitments entered into by new member states*, Doc. No. 7037 (1994).

membership were lacking there. Yet the absence of this “common heritage”—an absence that was a primary motif of the Cold War<sup>14</sup>—did little to abate the zeal with which both the Council and Russia sought to expand the organization’s membership. Paradoxically, the absence of the prerequisite values led membership to be viewed as a catalyst furthering their development. The failure to meet the requirements for membership became a reason to offer membership. That choice produced very mixed results, at best, and was so controversial that it precipitated the resignation of the Council’s Deputy Secretary General, who wrote that he left “because of disagreement with dilution of Council of Europe standards and values.”<sup>15</sup>

What role did law play in this membership process? Every lawyer asked by the Council’s organs to opine on the matter concluded that Russia unquestionably did not meet the requirements of membership. This was objectively true. But both the lawyers and the politicians seeking their advice recognized that the normative question whether, nevertheless, Russia should be admitted to membership was not fully resolved by legal analysis.

Law can have a significant role to play even when it is not strictly observed. In that way, one might see parallels here with the recognition of Abram Chayes that law “was one of the critical forces moulding decision” in the Cuban Missile Crisis, the seminal event of his tenure as Legal Adviser in the U.S. Department of State. Chayes’ short, famous book examining that crisis concluded that law

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<sup>14</sup> *Foreign Relations of the United States, 1946, Eastern Europe, The Soviet Union, Vol. 6, The Chargé in the Soviet Union (Kennan) to the Secretary of State*, (Moscow: Telegram received Feb. 22, 1946), Doc. 475. (“Finally we must have courage and self-confidence to cling to our own methods and conceptions of human society. After all, the greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping.”); U.S. Nat’l Sec. Council Rep., NSC 68: United States Objectives and Programs for National Security, 8 (1950) (“The whole success of the proposed program hangs ultimately on recognition by this Government, the American people, and all free peoples, that the cold war is in fact a real war in which the survival of the free world is at stake.”); Nikita Khrushchev, remarks at the Polish Embassy in Moscow, *quoted in TIME*, Nov. 26, 1956 (“About the capitalist states, it doesn’t depend on you whether or not we exist. If you don’t like us, don’t accept our invitations, and don’t invite us to come to see you. Whether you like it or not, history is on our side. We will bury you!”); Leonid Brezhnev, Speech to the Fifth Congress of the Polish United Workers’ Party (Nov. 12, 1968), *reprinted in FOREIGN BROAD. INFO. SERV. SPECIAL MEMORANDUM*, 64 (Nov. 4, 1980) (“Experience shows that in present conditions the victory of the socialist order in this or that country can be regarded as final and the restoration of capitalism can be regarded as excluded only if the communist party, as the guiding force of society, firmly carries through a Marxist-Leninist policy in the development of all spheres of public life; . . . if it maintains itself and propagates amidst the people vigilance with regard to the class enemy, irreconcilability to bourgeois ideology . . .”); Margaret Thatcher, Speech at Kensington Town Hall (Jan. 19, 1976) (“The Russians are bent on world dominance, and they are rapidly acquiring the means to become the most powerful imperial nation the world has seen . . . At Helsinki we endorsed the status quo in Eastern Europe. In return, we had hoped for the freer movement of people and ideas across the Iron Curtain. So far we have got nothing of substance. . . . But we must also heed the warnings of those, like Alexander Solzhenitsyn, who remind us that we have been fighting a kind of ‘Third World War’ over the entire period since 1945—and that we have been steadily losing ground.”); Ronald Reagan, Speech to National Association of Evangelicals (Mar. 8, 1983) (“[I] urge you to beware the temptation of pride—the temptation of blithely..uh..declaring yourselves above it all and label both sides equally at fault, to ignore the facts of history and the aggressive impulses of an evil empire, to simply call the arms race a giant misunderstanding and thereby remove yourself from the struggle between right and wrong and good and evil.”).

<sup>15</sup> Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* 313, 313 (1998); *see also* Peter Leuprecht, *Introduction to Special Section on European Integration*, 46 *MCGILL L.J.* 845, 845 (2001) (“I personally am one of those who strongly believe that, if it is to be solid, this new European order of peace has to be founded on shared principles and values, in particular those of pluralist democracy, the rule of law, and respect for human rights.”).

could not be said to have *determined* its outcome, but law still played a key role in *structuring* the choices available to the political and military actors involved in making their decisions. In Chayes' view, law (even if not fully complied with) affected political decision-making by how it could constrain choices, legitimate conclusions, and provide a process or organizational structure for how the decision is reached.<sup>16</sup>

The decision to admit Russia, notwithstanding (and perhaps because of) its failure to meet the requirements of membership, is now viewed in the aftermath of a decade of increasing tension between Strasbourg and Moscow that ended with the first expulsion of a member state from the Council of Europe. Determining whether Russia's admission was the right decision is not the point of this paper. Rather, this paper takes a Chayesian view of how law channeled attention to the Council of Europe's values (most prominently displayed in the European Convention), directing the course of Russia's journey to membership, and in some ways perhaps legitimizing it, even while law fell short of determining the outcome of the final decision.

#### I. THE COUNCIL OF EUROPE'S EASTERN POLICY, 1950-1989

The pan-continental expansion of the Council of Europe was the ultimate intention of its founders.<sup>17</sup> Eastward expansion of the Council of Europe was an easy enough dream when its prospect was a distant, idealistic one at best. The Consultative Assembly (as the Parliamentary Assembly was then known) strongly expressed the goal of "unifying the whole of Europe . . . since a united Europe in itself constitutes an essential factor in the establishment of an enduring peace."<sup>18</sup>

The singular stumbling block to that goal was the Soviet Union, which "remained entrenched behind its fundamental positions regarding the questions over which West and East have been so long divided: German reunification, European security, the creation of a free and united Europe, the subversive activities of international communism, etc."<sup>19</sup> Rock solid was the statement of the Council's values in any negotiation with this adversary over any such European unification: "Respect for human rights and fundamental freedoms remains an indispensable condition of the establishment of relations based on mutual trust and of a fruitful co-operation between the peoples, which in turn presuppose a sincere effort to achieve mutual understanding."<sup>20</sup>

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<sup>16</sup> CHAYES, *supra* note 1, at 7 ("The study then considers in turn the principal ways in which law affected, or might be thought to have affected, the course of action adopted. First, as a constraint on action; second, as the basis of justification or legitimation for action; and third, as providing organizational structures, procedures, and forums.")

<sup>17</sup> Leuprecht, *supra* note 15, at 326.

<sup>18</sup> EUR. CONSULT. ASS., *Setting out the policy of the Council of Europe in the light of recent developments in the international situation*, 25th sitting, Doc. No. 216 (1953).

<sup>19</sup> EUR. CONSULT. ASS., *Common European Policy at future East-West conferences*, Doc. No. 419 (1955).

<sup>20</sup> EUR. CONSULT. ASS., *Setting out the policy of the Council of Europe in the light of recent developments in the international situation*, 5th Sess., Res. 44 (1953) (The draft of this resolution was adopted by the Committee on Political Affairs and Democracy by seventeen votes to one with two abstentions.); see EUR. CONSULT. ASS., *Definition of the policy of the Council of Europe in the light of recent developments in the international situation*, 5th Sess., Doc. No. 216 (1953).

This was no mere idle wish. One of the first resolutions of the Parliamentary Assembly instructed its Standing Committee to create a special committee to ensure that the interests of “certain nations which are precluded from participating in the work of the Council of Europe . . . shall be considered in every proposal which may be formulated by the Assembly or its Committees.”<sup>21</sup> Two years later and specifically recalling that resolution, a budget line was recommended for broadcasts and publicity about the Council in non-member states, akin to Vatican and Radio Free Europe transmissions. Justifying such expenditures, the rapporteur for the Committee on Relations with European Non-Member Countries, Karl Georg Pfleiderer, emphasized the long-term goal of winning the hearts and minds of the “peoples concerned” rather than their unrepresentative, externally imposed rulers: “The Council of Europe has no need of arms to spread its ideals and all propaganda directed against those ideals will in the end be proved false.”<sup>22</sup> But inclusion in the Council was not a gift to be bestowed unearned:

The conditions under which a State may become eligible to join the Council of Europe should be explained repeatedly. It should be emphasised that the Council is in no sense a "closed shop" and that its Members actively wish non-Member countries to join it. On the other hand, it should be equally emphasised that respect of the human rights and fundamental freedoms guaranteed by the Convention and Protocol for the protection of Human Rights and fundamental freedoms is essential; examples of the practical application of the provisions of this Convention should be given and often repeated.<sup>23</sup>

For good measure, the Assembly passed another resolution, unimaginatively titled “Reaffirming once more the Assembly's faith in the unity of the whole of Europe,” proclaiming “that Europe represents one spiritual and economic whole, linked by a common cultural heritage, geography and historical tradition.”<sup>24</sup> Following this preambular assertion, the Assembly resolved that it:

Looks forward to the day when all the countries of Europe shall feel able or shall, be free, to join the Council of Europe; when all those now subject to foreign constraint or a totalitarian regime may enjoy the liberties enshrined in the European Convention on Human Rights, and thus be eligible through their

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<sup>21</sup> EUR. CONSULT. ASS., *Creation of a Special Committee to watch over the Interests of European Nations not represented on the Council of Europe*, 2nd Sess., Res. 14 (1950) (Adopted 28th August 1950, at the conclusion of the Debate on the second Report of the Committee on General Affairs. The text of the resolution was unanimously adopted by the Committee on General Affairs.); see EUR. CONSULT. ASS., *Changes in the political structure of Europe necessary to achieve a greater unity between the Members of the Council of Europe and to bring about effective cooperation in various fields specified in Article 1 of the Statute*, 1st Sess., Doc. No. 4 (1950).

<sup>22</sup> EUR. CONSULT. ASS., *Ways and means of giving publicity to the Council of Europe in European non-member States*, 4th Sess., Doc. No. 3 (1952).

<sup>23</sup> *Id.* ¶ 2.9.

<sup>24</sup> EUR. CONSULT. ASS., *Reaffirming once more the Assembly's faith in the unity of the whole of Europe*, 4th Sess., Res. 22 (1952).

freely elected representatives to become Members of the Council of Europe, as contemplated by the Preamble and by Articles 1, 3 and 4 of the Statute, and to work together with unity of purpose for the maintenance of peace and the promotion of the well being of all Europe.<sup>25</sup>

That day seemed a distant dream in 1952. Fear that diplomatic engagement with the Soviet Union would foster communist expansion (ideologically as well as geo-politically) settled the first two decades of the Cold War into a deep freeze. The thaw of détente began with the convening of the Conference on Security and Co-operation in Europe (CSCE), which progressed through a series of meetings beginning in Helsinki in 1973 and followed by meetings in Geneva, Helsinki again (for the signing of the Act in 1975), Belgrade, Madrid, and Vienna. Of the Act's four "baskets," it was the third one on human rights that both achieved the most progress and attracted the attention of the Council of Europe's leadership. It was, after all, democracy and human rights that provided the foundation for the Council's sense of purpose and values.

By the early 1980s, the Council's general policy on east-west relations in Europe was fairly settled. It had long expressed support for what became known as the "CSCE process" and repeatedly sought greater involvement, even chafing occasionally at its exclusion from various meetings.<sup>26</sup> Many of these resolutions begin with broad statements of principle about human rights and law that echo the expressions found in adopted texts of the Council about its own foundational values. This is perhaps understandable given that the first three decades of the Council's existence had afforded few opportunities to inquire more deeply into their use as criteria for membership.<sup>27</sup> Continuing this tradition, these resolutions also tended to limit themselves to precatory expressions for greater study, monitoring, advising, and encouragement of ongoing processes conducted primarily by the diplomatic corps of participating states. The Council seemed to have a sideline role.

In 1985, however, two factors contributed to a change toward a more proactive approach. On March 11, 1985, Mikhail Gorbachev was selected to be General Secretary of the Communist Party of the Soviet Union. On June 12, 1985, the Colombo Commission (Commission of Eminent European Personalities) released its interim report on what was rather euphemistically called the long-term future of European cooperation (the final report was

<sup>25</sup> *Id.* ¶ 1.

<sup>26</sup> EUR. PARL. ASS., *Security and co-operation in Europe (General policy of the Council of Europe)*, 25th sitting, Res. 588 (1975); EUR. PARL. ASS., *CSCE-Results, Prospects and consequences for Europe*, 27th Sess., Res. 595 (1975); EUR. PARL. ASS., *Implementation Final Act of the Conference on Security and Co-operation in Europe*, 28th Sess., Doc. No. 3781 (1976); EUR. PARL. ASS., *Implementation of the Final Act of the CSCE*, 29th Sess., Res. 654 (1977); EUR. PARL. ASS., *Implementation of the Final Act of the CSCE in Belgrade (General policy of the CE)*, 30th Sess., Res. 672 (1978); EUR. PARL. ASS., *Security and Co-operation in Europe*, 32nd Sess., Res. 732 (1980) (adopted by the Standing Committee, acting on behalf of the Assembly (July 3, 1980)); EUR. PARL. ASS., *Security and co-operation in Europe, General Policy of the Council of Europe*, 33rd Sess., Res. 750 (1981); EUR. PARL. ASS., *Madrid meeting of the CSCE (general policy of the Council of Europe)*, 33rd Sess., Res. 759 (1981); EUR. PARL. ASS., *CSCE meeting in Madrid*, 35th Sess., Res. 806 (1983); EUR. PARL. ASS., *East-West relations (General policy of the Council of Europe)*, 36th Sess., Res. 826 (1984).

<sup>27</sup> Hans Winkler, *Democracy and Human Rights in Europe. A Survey of the Admission Practice of the Council of Europe*, 47 AUSTRIAN J. PUBL. INTL. L. 147, 149–53 (1995) (noting readmission of Greece and admission of Spain and Portugal as rare instances of the development of some limited exploration of the question in emerging Council practices).



published in June 1986).<sup>28</sup> The debate it sparked laid open the growing sense in Strasbourg that the European Community was outpacing the Council of Europe in importance, power, and prestige.

As the next section of this paper explores, the Gorbachev factor (to borrow Archie Brown's famous phrase) opened a door and the Colombo factor helped provide the Council with the impetus to walk through it. As Harold Lied put the issue: "The crucial question for us is: who is to take the initiative in this European process?"<sup>29</sup> His answer was equally clear: "We, in the Council of Europe, have a thirty-five-year record of good work in the service of European co-operation and European democracy."<sup>30</sup>

[W]e shall, once again, have to be the driving force behind a new move towards Europe . . . [I]t is in this spirit that we wish to make a further contribution towards strengthening the feeling of European identity among all who share a cultural heritage which is enormously valued by all the peoples of Europe.<sup>31</sup>

He was still talking about the then twenty-one member states of the Council of Europe. That was soon to change.<sup>32</sup>

## II. THE POLICY PIVOTS: MIKHAIL GORBACHEV'S "COMMON EUROPEAN HOME"

On the unseen edge of its eastward expansion into the countries that would emerge from the collapsing Soviet empire, the Committee of Ministers doubled down in 1986 on its commitment to its core values. Ironically enough, this statement came in the form of what was essentially a Soviet-style "five-year plan," the Committee of Minister's Third Medium-Term Plan 1987-1991.<sup>33</sup> Leading off the organization's priorities were "A Europe of human rights and individual freedoms" and "The strengthening and defence of democracy – Europe in the world." With regard to the former, the Plan gave "[p]ride of place" to its existing instruments protecting civil, political, economic, and social rights.<sup>34</sup> About the latter, the Plan noted: "The democratic values which lie at the root of our societies also underpin that 'unity between its Members' which

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<sup>28</sup> EUR. COUNCIL OF MINISTERS, *Political Dialogue – Organization and Preparation*, CM (85) 189, at 1, n. 1 (1985). This report explored that topic both as related to greater co-operation within and among Council of Europe institutions and as it related to the same between the Council and what was then the European Community. It is the latter topic that is of concern to this paper.

<sup>29</sup> EUR. PARL. ASS. DEB. 12<sup>TH</sup> SESS. 386 (Sept. 27, 1985). Harald Lied was a conservative deputy in PACE from Norway and rapporteur for the Political Affairs Committee on several reports on the Colombo Commission, European co-operation, and general east-west policy.

<sup>30</sup> *Id.* at 387.

<sup>31</sup> *Id.*

<sup>32</sup> EUR. PARL. ASS., *Recommendation 1017*, 13th Sess., Doc. No. 5355 (1985); EUR. PARL. ASS., 20th Sess., Res. 866 (Sept. 25, 1986) (Supporting the recommendations of the Colombo Commission, *inter alia*, for greater co-operation and links between the Council and non-member states and encouraged greater engagement with the CSCE process.).

<sup>33</sup> COUNCIL OF EUROPE, *THIRD MEDIUM-TERM PLAN 1987-1991* (1986). The Plan was adopted by the Committee of Ministers on November 20, 1986, by Res. (86) 21.

<sup>34</sup> *Id.* at 11.

is the statutory objective of the Council of Europe.”<sup>35</sup> The plan says virtually nothing about the countries of Eastern Europe or those that would shortly emerge from the Soviet Union, the future stressors on that unity, and those values.

On the occasion of the fortieth anniversary of the Council of Europe in 1989, the Committee of Ministers reaffirmed those values: “[T]he Council’s statutory role of achieving an ever greater unity between its member states on the basis of the principles of pluralist democracy and human rights is an essential contribution to any effort aimed at European unity.”<sup>36</sup> Its declaration focused on both of the pressuring factors referenced in the previous section, warily saluting the accomplishments of the European Community while insisting on “political dialogue” with its rival, while encouraging in the countries of Eastern Europe “every development . . . which is likely to lead to improved implementation of these principles.”<sup>37</sup>

Russia’s impossible-to-predict path to membership began with a speech given on July 6, 1989, by Mikhail Gorbachev before the Parliamentary Assembly of the Council of Europe.<sup>38</sup> The decision to invite him was made by the Assembly’s Standing Committee on June 30, 1988.<sup>39</sup> As Catherine Lalumière (then rapporteur for the report of the Assembly’s Political Affairs Committee) implied that growing rivalry between Europe’s two international clubs was a catalyst: “The obvious political importance of such an invitation is confirmed by the fact that the European Parliament is also contemplating a similar invitation for the first months of 1989.”<sup>40</sup>

Gorbachev devotes several pages in his memoirs to this speech.<sup>41</sup> The driving theme of the speech—“Europe is our common home”—is also the title of a subsection of one of the chapters in his memoirs.<sup>42</sup>

This section of the article argues that Gorbachev’s use of the “common home” metaphor obscured the fact that his ambition was the co-habitation of *separate* social and political systems in a demilitarized European space, *not* the removal of those differences or replacement of Soviet values with European ones.<sup>43</sup> As this speech was an opportunity to launch the special guest status that

<sup>35</sup> *Id.* at 12.

<sup>36</sup> EUR. COUNCIL OF MINISTERS, *Declaration on the Future Role of the Council of Europe in European Construction*, 84th Sess., CM (89) PV1 (1989).

<sup>37</sup> *Id.* ¶¶ 7, 12.

<sup>38</sup> Soviet and Russian diplomat Alexander Orlov, later the Russian Federation’s permanent representative to the Council, has written that Gorbachev was positively inclined toward the Council as early as spring 1987. Orlov, then political adviser at the Soviet Embassy in Paris, had sent a telegram report to Moscow that “emphasised that this somewhat undervalued Organisation carried within it the ideals of democracy, human rights and the rule of law, which were the new direction in which [Gorbachev] wanted to take the USSR . . .” Orlov reports “[a] number of years later I learnt that this telegram had met a rather extraordinary fate, since it had got as far as Mikhail Gorbachev’s office and had come back, annotated in his own hand, with the instruction, ‘We must develop contacts with this organisation!’” Alexander Orlov, “Europe, our common home” in *EUROPE: A HUMAN ENTERPRISE. THIRTY STORIES FOR SEVENTY YEARS OF EUROPEAN HISTORY* 96 (Denis Huber, ed., 2019).

<sup>39</sup> EUR. PARL. ASS., *Report on the General Policy of the Council of Europe - East-West Relations*, 23d Sess., Doc. No. 5937, 35 (Sept. 15, 1988) [hereinafter *Report on East-West Relations*].

<sup>40</sup> *Id.*

<sup>41</sup> МИХАИЛ ГОРБАЧЕВ, *ЖИЗНЬ И РЕФОРМЫ*, книга 2, 194–96 (1995). Gorbachev says he used the metaphor spontaneously in an interview with French journalists in October 1985. *Id.*, at 71.

<sup>42</sup> The first subsection of Chapter 20 is titled «Европа – наш общий дом». *Id.* at 70.

<sup>43</sup> “Differences between states cannot be eliminated. In fact, they are even salutary, as we said on more occasions than one. Provided, of course, that the competition between different types of society is aimed at creating better material and spiritual conditions of life for people.” Mikhail Gorbachev, *Speech*

was the first vehicle for eastward expansion, this difference of emphasis had significant repercussions. And that guest status vehicle—a legal process—augured the compromises soon to be made to the Council's professed values.

One strained mightily to find a “common heritage” of shared “spiritual and moral values” between East and West during these hottest days of the Cold War. To cite just one example from his memoirs, Gorbachev recalls wondering whether Margaret Thatcher would cancel her first visit to the Soviet Union in 1987 (the first of any British Prime Minister in more than a decade) following her incendiary speech at a Conservative Party meeting.<sup>44</sup> Gorbachev complained that “Mrs Thatcher had maintained that the Soviet Union aspired to ‘establish Communism and domination worldwide’ and that ‘Moscow’s hand’ could be seen in virtually every conflict in the world.”<sup>45</sup> So much for a common heritage of shared values.

Gorbachev’s speech described a complicated understanding of European integration aimed at de-escalating military conflict, not harmonizing social or political systems. “This meeting could,” he began, “perhaps, be viewed both as evidence of the fact that the pan-European process is a reality and of the fact that it continues to evolve.”<sup>46</sup> At the same time, there was another reality that he also acknowledged: “The fact that the states of Europe belong to different social systems is a reality.” Healthy competition between socialism and capitalism was to be welcomed; the Western political objective of what he called “overcoming socialism” was to be rejected, along with the military confrontation that he identified as the real division of Europe:

Thanks to perestroika, the Solviet [sic] Union will be in a position to take full part in such an honest, equal and constructive competition. For all our present shortcomings and lagging behind, we know full well the strong points of our social system which follow from its essential characteristics.

And, we are confident that we shall be able to make use of them both to the benefit of our [sic] ourselves and of Europe.<sup>47</sup>

The point is not to deny the processes of change. Indeed, Gorbachev’s emergence as a transformative leader and his substantial successes with *perestroika* and *glasnost* confirmed the possibility and desirability of change

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to the Council of Europe in Strasbourg: “Europe as our common home” (Jul. 6, 1989) [hereinafter Gorbachev Speech].

<sup>44</sup> ГОРБАЧЕВ, *supra* note 41, at 78. Margaret Thatcher, Speech to Conservative Central Council (Mar. 21, 1987) “Of course, when I go to Moscow, I shall be representing a very different kind of country from that of Mr Gorbachev . . . One of the gulfs between the Socialists and ourselves is this essential faith in the individual. Conservatives are not in the business of Government to forge a standardised society. In States where that is the aim, political liberty is lost.” Earlier in the speech, Thatcher wondered aloud “We hear new language being used by their Leaders. Words which we recognise like ‘open-ness’ and ‘democratisation.’ But do they have the same meaning for them as they do for us?”

<sup>45</sup> MIKHAIL GORBACHEV, MEMOIRS 434 (Doubleday Trans., 1996). When he told her as much at their Kremlin meeting, the Iron Lady gave as good as she got, according to Gorbachev: “But Thatcher stood her ground saying: You are supplying weapons to Third World countries but the West supplies food and even helps establish democratic institutions there.” Gorbachev notes that, for the sake of continued dialogue, they agreed to disagree.

<sup>46</sup> Gorbachev Speech, *supra* note 43.

<sup>47</sup> *Id.*, *supra* note 43.

within the Soviet Union, just as the rescission of the Brezhnev doctrine and Gorbachev's December 1988 speech at the United Nations sought change in international affairs. The point is simply to note that the sharing of values repeatedly invoked as predicates for membership in the Council of Europe were all strikingly absent from this speech. From Gorbachev's perspective, their adoption as some sort of *prix-fixe* set was simply not the goal.<sup>48</sup> The goal was to end "the outmoded stereotypes that the Soviet Union continues to be suspected of hegemonistic designs and of the intention to decouple the United States from Europe."<sup>49</sup> Gorbachev was complaining that the West wasn't listening.

To that end, cooperation in a common European home was desirable "by seeking to transform international relations in the spirit of humanism, equality, and justice and by setting an example of democracy and social achievements in its own countries."<sup>50</sup> He continued:

The Helsinki process has already commenced this important work of world-wide significance.

Vienna and Stockholm brought it to fundamentally new frontiers. The documents adopted there are today's optimal expression of the political culture and moral traditions of European peoples.

Now it is up to all of us, all the participants in the European process, to make the best possible use of the groundwork laid down through our common efforts. Our idea of a Common European Home serves the same purpose too.<sup>51</sup>

Gorbachev revisited these concluding sentences of the opening section of his speech as he concluded his remarks overall (with a substantial middle portion of the speech given over to disarmament and security issues). Gorbachev advanced several proposals for further cooperation on economic, environmental, and cultural issues. He then advanced a series of aspirations for what he called the "humanitarian content of the pan-European process."<sup>52</sup> Emphasizing the importance of human rights and law, Gorbachev returned to his theme of a common European home, but one housing recognizably different occupants. Noting the recent resolution of the Congress of People's Deputies in support of the Helsinki process and acknowledging the existence of "some universally recognized rules and principles," Gorbachev emphasized that every country has

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<sup>48</sup> Gorbachev's speech at the UN confirms this point, acknowledging as a starting point that the "de-ideologization of interstate relations" did not mean an end to starkly different capitalist and socialist state systems: "We are not giving up our convictions, philosophy, or traditions. Neither are we calling on anyone else to give up theirs. Yet we are not going to shut ourselves up within the range of our values. That would lead to spiritual impoverishment, for it would mean renouncing so powerful a source of development as sharing all the original things created independently by each nation. In the course of such sharing, each should prove the advantages of his own system, his own way of life and values, but not through words or propaganda alone, but through real deeds as well." *Address by Mikhail Gorbachev at the UN General Assembly Session Excerpts*, HISTORY AND PUB. POL'Y ARCHIVE PROGRAM (Dec. 7, 1988), [hereinafter *Address by Mikhail Gorbachev*].

<sup>49</sup> Gorbachev Speech, *supra* note 43.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

“their own laws and traditions in the humanitarian sphere” that suggested the value of making “a comparison of the existing legislations on human rights by setting up that end an ad hoc working group or a kind of European institute for comparative humanitarian law.”<sup>53</sup> Gorbachev warned that “[i]n view of the different social systems we are not likely to achieve a complete identity of views.”<sup>54</sup> With all these caveats, he then concluded by noting “[t]his makes it possible to speak of the possibility of creating a European legal space.”<sup>55</sup>

As will be noted below, talk of Soviet “humanitarian law” could have made Orwell blush. Comparing Soviet approaches, in any serious way, to the human, civil, and political rights enshrined in law (if not always practiced) in Western democracies was an apples-to-oranges comparison. Thus, if the values invoked in the Council’s founding documents meant anything beyond rhetorical flourishes, the failure to recognize how decidedly unshared a heritage separated east and west in 1989 seeded the ground for future problems at a time of fresh incentives to expand this international organization.

It is to those incentives that this section now turns. From the point of view of Gorbachev’s host, Catherine Lalumière, now Secretary General of the Council of Europe, Gorbachev’s complex view of a common European home opened an opportunity to improve the status and influence of the international organization she led. In the words of Fabio Liberti, she was “convinced of the important role [the Council of Europe] could play, restored its proactive stance, increased its contacts and developed democracy programmes” to reach the populations and emerging leadership of the central and eastern European states she saw regaining their independence in the wake of Gorbachev’s reforms.<sup>56</sup>

As a deputy in the Parliamentary Assembly and rapporteur for the Political Affairs Committee, Lalumière drafted a lengthy report on the Council’s east-west relations.<sup>57</sup> Tellingly, the explanatory memorandum of the report began with developments in the Soviet Union and actions already taken in response by the European Community. Lalumière noted that she attended a meeting in Brussels in July 1988 at which the European Parliament’s Political Affairs Committee adopted a detailed resolution on political relations with the Soviet Union, which she quoted extensively to build her case that the Council needed to keep up with its competing European organization.<sup>58</sup>

Expressing her own thoughts, Lalumière emphasized the importance (“a historic event”) of the June 1988 Party Conference at which Gorbachev successfully called for secret, multi-candidate elections to a new legislative body, the Congress of People’s Deputies. She also highlighted Gorbachev’s recently published book, *Perestroika: New Thinking for Our Country and the World*. Lalumière allowed herself to speculate that these incipient reforms, passed as well as proposed, could mean that the Soviet Union might be “aspiring to become a state based on the rule of law.”<sup>59</sup> Adding to the empirical evidence for this emerging case, she noted positive, albeit preliminary, results of a meeting

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (emphasis in original).

<sup>56</sup> Fabio Liberti, *Why we need the Council of Europe*, LE MONDE DIPLOMATIQUE (Sept. 2012), <https://mondediplo.com/2012/09/18council>.

<sup>57</sup> *Report on East-West Relations*, *supra* note 39.

<sup>58</sup> *Id.* at 4–5.

<sup>59</sup> *Id.* at 6.

between the enlarged Bureau of the Parliamentary Assembly and a delegation of the Supreme Soviet that April in Strasbourg.<sup>60</sup>

The report soon revealed the purpose of this detailed presentation: “Natural, healthy caution must not, however, mean a frosty attitude.”<sup>61</sup> Lalumière had clearly seen an opportunity to advance the institutional interests of the Council of Europe by playing to its strength as an organization focused on democracy and human rights.<sup>62</sup> She did not want to lose that opportunity due to the predilection of diplomats and bureaucrats toward hesitation and restraint.<sup>63</sup> (A useful comparison is the more cautious report for the Committee on Relations with European Non-Member Countries of her colleague, Loyola de Palacio Valle Lersundi, who was far more suspicious of the Soviet Union’s self-reported reforms and unwilling “to be either naïve or accomplices.”)<sup>64</sup> At the same time, she seems to have recognized what was at risk: “Another principle is that the Council of Europe must promote an awareness of Europe’s identity while respecting its own principles.”<sup>65</sup> Comparing her more positive impressions of changes in the Soviet Union to her observations of other countries in Eastern Europe, she continued:

Once again, freely elected members of parliament cannot be suspected of betraying the principles of democracy and human rights which our organisation defends. Attention may also be drawn to a useful complementarity. It would for example not be desirable at present for the governmental organ to invite the Romanians. But the parliamentary organ can do so by initiating a dialogue which can be tough and rather “undiplomatic,” as was the case of that with the representatives of the Romanian Grand National Assembly.<sup>66</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 13, ¶ 34.

<sup>62</sup> *Id.* at 13, ¶ 37 (“As we have seen, the draft resolution (Hänsch) of the Political Affairs Committee of the European Parliament refers to the CSCE process, but concentrates on the fields which are of particular interest to the European Community, namely trade, technology and environmental protection, that is to say the second basket of the Helsinki Final Act. It deals only secondarily with security (first basket) and not at all with the third basket which is the province of other committees of the Parliament and, above all, the Council of Europe.”).

<sup>63</sup> *Id.* at 12, ¶ 32 (“[I]n my opinion, the Committee of Ministers would be displaying excessive caution if, for example, it were to defer any decision to invite an Eastern European country, which had expressed an interest, to accede to a Council of Europe convention on the pretext that the Vienna meeting (which seems set to continue for some time yet) has not ended.”).

<sup>64</sup> EUR. PARL. ASS., Opinion on the General Policy of the Council of Europe - East-West Relations, 24th Sess., Doc. No. 5958, 2, ¶ 5, (Oct. 5, 1988).

<sup>65</sup> *Report on East-West Relations*, *supra* note 39, at 12–13, ¶ 33. This statement appears derived from a communiqué of the Committee of Ministers the previous year, though omitting the word “statutory”, which Lalumière included as an attachment to her report (“The ministers focused particular attention on the question of co-operation between the Council of Europe and countries of Eastern Europe, which has become more concrete as a result of recent or planned contacts with the authorities of certain of these countries. In this co-operation, which will take account of the commitments subscribed to in the Helsinki Final Act and of the development within the CSCE process, the Council of Europe should seek to promote awareness of Europe’s identity while respecting its own statutory principles.”). *See id.* at App. II, 23.

<sup>66</sup> *Id.* at 13, ¶ 33.

Concluding her report (which included as an appendix the proposals reached at the Strasbourg meeting with the delegation from the Supreme Soviet), Lalumière laid down the challenge, again obliquely referencing the Council's rival institution as a catalyst for action:

The geographical situation, cultural role and philosophy of the Council of Europe confront it, even more than the Twelve, with one of the most exhilarating challenges in all its forty years of existence: the hopes aroused by the growth of a "European awareness" in the societies of Eastern Europe.<sup>67</sup>

The question that Lalumière neither asked nor answered in her report was what limit should be placed on such optimistic outreach.<sup>68</sup> What were the red lines that the Council should not cross with regard to risking its own identity and principles in order to promote them in the Soviet Union and Eastern Europe? The measures adopted to facilitate the invitation to Gorbachev to speak in Strasbourg, however, provided a blueprint for the clever balancing of political and legal considerations that not only structured Russia's road to membership but breathed new life into the Council of Europe as an organization that could play a key role in the unification of a post-Cold War Europe. For an organization conceived with the idea of unifying a post-World War II Europe, the opportunity must have been nearly irresistible. Multiple references to a "common European home" were music to the ears of anyone interested in the institutional growth of the Council of Europe. And those ears were not listening for the nuance that Gorbachev added to the phrase.

Almost three months before Gorbachev's speech, on 18 April 1989, a report was submitted to the Parliamentary Assembly on the creation of "special guest status" there for certain non-member states of the Council of Europe.<sup>69</sup> Since there already existed both the status of "parliamentary observer" and "associate member," one might wonder at the purpose of yet a third category. The answer is found in the requirements of each. According to a decision taken in 1965 interpreting Rule 55 of the Assembly's rules of procedure, observer status "shall be granted only to official representatives of democratic European non-member states."<sup>70</sup> And according to Article 5 of the Statute of the Council of Europe, an

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<sup>67</sup> *Id.* at 21, ¶ 61.

<sup>68</sup> Discussing the interim Colombo Commission report in September 1985, the Committee of Ministers had done no more than suggest a division between itself and the responsibilities of the Parliamentary Assembly on the matter. See EUR. PARL. ASS., *Conclusions of the 388<sup>th</sup> Meeting of the Ministers' Deputies held in Strasbourg from 12-23, 77th Sess.*, Doc. No. CM/Del/Concl(85)388, 13 (Sept. 27, 1985) ("It was emphasised, however, that the political dialogue between member governments, concerning both the political aspects of European co-operation and international political questions of topical interest, should remain the concern of the Committee of Ministers and should thus be confined to representatives of member governments, while being encouraged and developed in every way. Participation by representatives of other States ought not to be envisaged, although the question might of course be examined again in the future in a specific case. On the other hand, contacts with non-European democracies should as a rule be conducted within the Strasbourg Conferences under the auspices of the Parliamentary Assembly.").

<sup>69</sup> EUR. PARL. ASS., *Report on a Special Guest Status with Parliamentary Assembly*, Doc. No. 6036 (Apr. 18, 1989).

<sup>70</sup> *Id.* at Appendix, Status of parliamentary observer, at 5, n. 1.

extension of an invitation to become an associate member could only be made to a European country “which is deemed to be able and willing to fulfil the provisions of Article 3.”<sup>71</sup> As will be seen in the next section, acceptance of that requirement, “the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms,” could not be understood to be more than an aspiration by even the most optimistic of observers.<sup>72</sup>

Neither status was within reach of the Soviet Union of 1989, a country neither describable as “democratic” nor plausibly subject to the constraints of universal human rights and the rule of law. This was all but admitted by Gorbachev in his December 1988 UN speech, which conceded that the project was just beginning.

We have gone substantially and deeply into the business of constructing a socialist state based on the rule of law. A whole series of new laws has been prepared or is at a completion stage. Many of them come into force as early as 1989, and we trust that they will correspond to the highest standards from the point of view of ensuring the rights of the individual. Soviet democracy is to acquire a firm, normative base. This means such acts as the Law on Freedom of Conscience, on glasnost, on public associations and organizations, and on much else. There are now no people in places of imprisonment in the country who have been sentenced for their political or religious convictions. It is proposed to include in the drafts of the new laws additional guarantees ruling out any form of persecution on these bases. Of course, this does not apply to those who have committed real criminal or state offenses: espionage, sabotage, terrorism, and so on, whatever political or philosophical views they may hold.<sup>73</sup>

Gorbachev goes on to note how legal reforms such as those concerning the death penalty “are ready and waiting their turn,” while freedom of travel is a “problem” to be “resolved in a humane spirit.”<sup>74</sup> The “problem of the so-called ‘refusniks’” was noted, as was an intent “to expand” participation in human rights monitoring and a process of “examining an end to jamming of all the foreign radio broadcasts to the Soviet Union.”<sup>75</sup>

These were wonderful goals all, and so refreshingly promised by an ambitious and hopeful Soviet leader. But they could hardly be seen to come close to satisfying the requirements to be an associate member, or even parliamentary observer, at the Council of Europe. Let alone sufficient for full membership.

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<sup>71</sup> Statute of the Council of Europe, *supra* note 7, at Art. 5.

<sup>72</sup> *Id.* at Art. 3 (“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.”).

<sup>73</sup> Address by Mikhail Gorbachev, *supra* note 48.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*



The new special guest status, however, lowered the legal bar considerably. It was available to the national legislatures of European non-member states “which have shown their interest and which apply and implement the Helsinki Final Act and the instruments adopted at the CSCE conferences, together with the 1966 United Nations International Covenants on civil and political rights and economic, social and cultural rights.”<sup>76</sup> This criterion did not require *successful* application or implementation of things, as no metric of the quality of their activation is mentioned. The only requirement was a showing of “interest”—a diplomat’s dream of ambiguity.

This seems to be the first slippage of values put into practice. On June 8, 1989, less than a month after creating this special status, the Parliamentary Assembly extended this invitation to the Supreme Soviet.<sup>77</sup>

### III. THE RULES BEND: BORIS YELTSIN’S QUEST

#### A. *THE PRESSURES AND PARADOXES OF ENLARGEMENT*

In his Strasbourg remarks, Gorbachev flattered his hosts. The Council of Europe was “one of the epicenters of European politics and of the European idea.”<sup>78</sup> This was fulsome praise and not entirely accurate. General de Gaulle famously dismissed the organization as “that sleeping beauty on the banks of the Rhine” by comparison with the rising economic powerhouse of the European Communities.<sup>79</sup>

Unfair, perhaps, but the criticism stuck, and struck a sense of second-place status that ran deep.<sup>80</sup> Even as late as 2012, Secretary General Thorbjørn Jagland felt this pressure, and the exuberance, at finding a new calling that distinguished the organization. Recalling de Gaulle’s caustic remark in his first address as president, Jagland emphasized the change in mindset in Strasbourg that accompanied efforts to find a role to distinguish itself from the European Communities (soon to be Union):

The Council of Europe was called the sleeping beauty at the river Rhine. We had to be more outward-looking and forward-looking. In order to be relevant at the right time we had to look for partners rather than competitors, we had to ask ourselves how we could assist our member states, not only reporting about

<sup>76</sup> EUR. PARL. ASS., *Resolution 917 on a Special Guest Status with the Parliamentary Assembly*, 41st Sess. (May 11, 1989) ¶ 4.1.

<sup>77</sup> Klein, *Membership and Observer Status*, *supra* note 8, § 3.102. At the same time, invitations were also extended to the parliaments of Hungary, Yugoslavia, and Poland. *Id.*

<sup>78</sup> Gorbachev Speech, *supra* note 43.

<sup>79</sup> Liberti, *supra* note 51.

<sup>80</sup> DENIS HUBER, *A DECADE THAT MADE HISTORY: THE COUNCIL OF EUROPE (1989-1999)* 3, 14 (1999) (“Inevitably, the Council also felt a certain bitterness as it watched the Communities trying to take over ‘the European show’”; “In the 1980s, the Community’s enlargement . . . raised fresh questions concerning the Council’s *raison d’être*.”); Bruno Haller, “*Ostpolitik*” *makes its appearance in COUNCIL OF EUROPE, EUROPE: A HUMAN ENTERPRISE* 53 (Denis Huber, ed., 2019) (reflecting on his view, heading the private office of Secretary General Oreja, that improving relations in Eastern Europe could help keep the Council “in control of its destiny, at a time when the European Community was growing in influence”).

them. Therefore, we had to reorganize ourselves and refocus our resources.<sup>81</sup>

As this article argues, Gorbachev's speech helped catalyze that changed mindset. Catherine Lalumière perceived an opportunity for institutional renewal that she pursued as Secretary General, as did her successor in office, Daniel Tarschys. But, along the way, enthusiasm for that mission—coinciding as it did with the dreams of the organization's founders—led to a downward departure in applying the institution's professed values to its eager new members. Whether that was the right policy is a normative question about which reasonable minds differ. What is interesting, however, is the way the connection these values had to the legal requirements for membership influenced the outcome but (*à la* Chayes's experience of the Cuban Missile Crisis) did not determine it.

The first new member states were Finland (in May 1989),<sup>82</sup> followed by four countries of the former Warsaw Pact: Hungary (in November 1990);<sup>83</sup> the Czech and Slovak Federative Republic (February 1991);<sup>84</sup> Poland (November 1991);<sup>85</sup> and Bulgaria (May 1992).<sup>86</sup> As these states joined together in membership in the Council of Europe, the constituent republics of the Union of Soviet Socialist Republics were coming apart.<sup>87</sup> The constituent parts of the Soviet Union first declared sovereignty and then outright independence, raising the twin dangers of ethnic or nationalist tensions and the fragmentation of control over the Soviet Union's nuclear arsenal.<sup>88</sup> These dangers also presented the Council with an opportunity to promote its founding values—and raise its profile and importance—by its expansion eastward to eager prospective member states.

The Council started with the Baltic states of Lithuania, Latvia, and Estonia.<sup>89</sup> All three were Soviet Socialist Republics (SSRs), the highest tier in the hierarchy of Soviet federalism. All three had been previously sovereign states annexed through the Molotov-Ribbentrop Pact.<sup>90</sup> As the policy consensus in the West had been refusal to recognize this annexation, and since the Baltic three were among the first to issue declarations of sovereignty and independence from the Soviet Union, they were the logical starting point.

Moreover, the Parliamentary Assembly's creation of a special guest status for the Soviet Union was the obvious starting point for outreach to the Baltics. Like the USSR, none of these three republics could reasonably be understood to meet the criteria for full or associate membership in the Council of Europe or even observer status in the Parliamentary Assembly. Whatever their international legal status, their internal governance had been thoroughly

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<sup>81</sup> Council of Europe, *Communication by Thorbjørn Jagland on the State of the Council of Europe Communication to the Parliamentary Assembly* (Jan. 23, 2012).

<sup>82</sup> *See* Appendix, *infra*.

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> The course of the story of the collapse of the Soviet Union is a well-studied one. *See, e.g.*, ARCHIE BROWN, *THE GORBACHEV FACTOR* (Oxford Univ. Press, 1996); JEFFREY KAHN, *FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA* (Oxford Univ. Press, 2002).

<sup>88</sup> Jeffrey Kahn, *The Parade of Sovereignities: Establishing the Vocabulary of the New Russian Federalism*, 16 *POST-SOVIET AFFAIRS* 58–89 (2000).

<sup>89</sup> *See* Appendix, *infra*.

<sup>90</sup> NORMAN DAVIES, *EUROPE: A HISTORY* 996–997 (1996).

Sovietized. But the minimal requirement of having “shown their interest” in UN and CSCE human rights projects had already been attained by the country from which they had broken away in search of more freedom.<sup>91</sup>

The Parliamentary Assembly quickly recommended granting such status in the month following the attempted *coup d'état* against Gorbachev in August 1991.<sup>92</sup> It also took the opportunity to revisit the scope and orientation of its expansion project. Daniel Tarschys, then rapporteur for the Committee on Relations with European Non-Member Countries, put this under the heading “An Agenda for the Council of Europe”:

The Council's relations with the Soviet republics have hitherto been channeled through the Supreme Soviet of the Soviet Union. This needle's eye is now too small for the camel. Direct relations should be established with the NSREEs [the new sovereign republics of eastern Europe]. But who should be our partners and what areas of co-operation should be given priority?<sup>93</sup>

The question of partners was easily answered in light of Moscow's rapidly diminishing power over the constituent states of the USSR (and the end of the Brezhnev Doctrine over Central and Eastern Europe made the answer for that space even more apparent). The “parade of sovereignties” had shifted to a march to independence in the fifteen union republics of the USSR. While giving “special guest” status to the Baltic states, as noted above, Tarschys recommended fast-tracking co-operation activities with Ukraine, Belarus, Moldova, and Russia.<sup>94</sup> Finland, Hungary, the Czech and Slovak Federative Republic, and Poland had already been admitted as new members.<sup>95</sup> Bulgaria would be admitted the next day.

As to subject-matter priorities, Tarschys presciently recognized the difficulties inherent in the project. He warned that the Council of Europe, “if it is to achieve anything, cannot try to do everything.”<sup>96</sup> Security and economic issues, he advised, should be left on the whole to other institutions better placed to deal with them. The Council should play to its strengths: “support for democratic development, and support for the protection of civic rights with particular emphasis on minority rights.”<sup>97</sup> This obviously pointed to the Council's foundational values.

The Tarschys report—for the same committee Lalumière had warned against “the two pitfalls of over-enthusiasm and frosty caution”<sup>98</sup>—was also

<sup>91</sup> EUR. PARL. ASS., *Resolution 917 on a Special Guest Status with the Parliamentary Assembly*, 41st Sess. (May 11, 1989) ¶ 4.1.

<sup>92</sup> EUR. PARL. ASS., *Report on the Council of Europe and the new sovereign republics of Eastern Europe*, Doc. 6484, ¶ 1 (Sept. 13, 1991) [hereinafter *Report on the Council of Europe and the new sovereign republics of Eastern Europe*].

<sup>93</sup> *Id.* at 7, ¶ 17.

<sup>94</sup> *Id.* at 8, ¶¶ 18–19. The countries of the south Caucasus were, for now, left in a liminal position, while Tarschys diplomatically excluded the five Central Asian republics as “further removed both geographically and culturally” and therefore left to a status that “remains to be determined.”

<sup>95</sup> See Appendix, *infra*, for a timeline of admission.

<sup>96</sup> EUR. PARL. ASS., *Report on the Council of Europe and the new sovereign republics of Eastern Europe*, *supra* note 92, at 8, ¶ 20.

<sup>97</sup> *Id.* ¶ 21.

<sup>98</sup> EUR. PARL. ASS., *Report on the general policy of the Council of Europe - East-West relations*, Doc. 5937 at 5, ¶ 3 (Sept. 14, 1988).

more measured and precise (or, one could say, more frostily cautious than over-enthusiastic). Tarschys recognized a difference between the “hardware” of democracy—formal political institutions such as written constitutions, statutes, and structures—and the “software” of democracy:

Formal institutions, however, cannot sustain a democratic system unless they are underpinned by an infrastructure of informal institutions. Democracy in Western Europe relies heavily on the social mobilisation of groups, parties, interests and opinions. A pluralist system of mass communications is also an indispensable precondition for democratic growth and maturation. As the countries of Central and Eastern Europe now seek to develop their democratic systems, this “software” requires particular attention. Legal rules protecting the freedom of assembly, expression, etc. are necessary but not sufficient to promote a culture of pluralism and tolerance.<sup>99</sup>

Although not labelled as such, the democracy “software” that General Secretary Tarschys described had a lot to do with values. His recommendation was to employ the Council of Europe as a “clearing house and forum” for “sharing experiences and drawing lessons from other countries.”<sup>100</sup>

This was another instance of slippage between stated values and their practical application. From the perspective of Peter Leuprecht, the Deputy Secretary General from 1993 until his resignation on principle in 1997, this was an improper broadening of the Council’s mission:

The Council’s role is no longer limited to the defense of pluralist democracy, the rule of law, and human rights. Its new task is to play an active role in “democracy-building” in the post-communist countries, and to this end important programs have been created and implemented, some of which are conducted jointly with the European Commission.<sup>101</sup>

As will be seen, this expanded role worked profound changes on the orientation of the Council itself. Gorbachev had proposed a “common European home,” starting with the special observer status his speech essentially inaugurated and developing more meaningful exchanges between the Soviet Union, countries of the (soon-to-be former) Warsaw Pact, and the Council of Europe.<sup>102</sup> The collapse of Soviet power accelerated and deepened the connections these countries wanted with Europe, catalyzing their drives for full membership. Leuprecht’s concern—prescient in hindsight—was that the common European home built on the idea of shared values would become a metaphoric hospital for countries seeking to cure deficits in those same values. “This is not what the Council of Europe was supposed to be,” Leuprecht argued.<sup>103</sup> Advancing this

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<sup>99</sup> EUR. PARL. ASS., *Report on the Council of Europe and the new sovereign republics of Eastern Europe*, *supra* note 92, at 9, ¶ 23.

<sup>100</sup> *Id.* ¶ 24.

<sup>101</sup> Leuprecht, *supra* note 15, at 326.

<sup>102</sup> Gorbachev Speech, *supra* note 43.

<sup>103</sup> Leuprecht, *supra* note 15, at 332.

metaphor of sickness, he set forth and countered the argument “that by admitting countries, even if they are far from meeting the statutory requirements, one helps to promote the cause of democracy, the rule of law, and human rights in the countries concerned.”<sup>104</sup>

With a certain irony, I have called this the policy of “therapeutic” admission. The idea of therapy cannot be lightly dismissed. Some of the countries concerned suffer from serious evils and will have to go through a long healing process, but success in therapy presupposes the consent of the “patient.” Unfortunately, some of the leaders of the countries involved do not appear really willing to push through the necessary reforms and to honor their commitments.<sup>105</sup>

More than a year before Vladimir Putin became Russia’s acting president on the last day of the twentieth century, Leuprecht had accurately predicted the root cause of Russia’s rejection of the Council of Europe’s values and its subsequent expulsion from the organization.

The question left completely unanswered in the Tarschys report (and others around the same time) was how any of this related to prospective membership. Was membership the proper vehicle by which these values could be promoted in places lacking them in sufficient reserve to qualify for membership based on them? This was the central paradox of the process.

This paradox was most evident in what was left unsaid in the report. Tarschys took pains to note the “tragic course” of the twentieth century’s history of nationalism stoking ethnic resentments in central and eastern Europe, for which reason he insisted that “[h]igh standards of minority rights and minority protection must therefore be set in all NSREEs.”<sup>106</sup> But Tarschys suggested nothing beyond “particular attention” to the unspecified “software” required to build respect for the rule of law, democracy, and pluralism of other kinds in the post-Soviet era he anticipated.<sup>107</sup> And, indeed, considerable resources were being spent to encourage the development of these values and concrete reforms linked to them, including as part of the Demosthenes Programme, so that “the national institutions and legislation of these countries will gradually be brought into conformity with European norms,” still held to be “a *sine qua non* of all potential candidates” for membership.<sup>108</sup> The twists and turns of the collapsing

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> EUR. PARL. ASS., *Report on the Council of Europe and the new sovereign republics of Eastern Europe*, *supra* note 92, at 9, ¶¶ 25–26.

<sup>107</sup> *Id.* at 9, ¶ 23.

<sup>108</sup> Andrew Drzemczewski, *The Council of Europe’s cooperation and assistance programmes for countries of Central and Eastern Europe in the human rights field*, 12 HUM. RTS. L.J. 335, 336–37 (1991). The Demosthenes Programme was soon followed by the Themis programme (on rule-of-law assistance) and the Lode programme (for assistance developing local democracy). This metaphor seems a little insubstantial given the importance of these values to the Council of Europe. Nearly simultaneously, another rapporteur (Manuel Soares Costa) working on the same issue for the Political Affairs Committee (now Committee on General Affairs) noted that the Council had established special guest status and its “Demosthenes programme” to encourage those values “in the framework of the only international organisation which aspires to be genuinely pan-European, without sacrificing the ideals of democracy and human rights which are its *raison d’être*.” See EUR. PARL. ASS., *Report on the general policy of the Council of Europe-The crisis in the Soviet Union*, Doc. 6486, 7, ¶ 22 (emphasis added) (Sept. 12, 1991).

Soviet empire only served to raise the stakes. Events like the August 1991 attempted coup against Gorbachev exposed the risks of moving too slowly.<sup>109</sup>

From this point, a refrain develops in the Council's engagement with Eastern Europe and the countries of the former Soviet Union, especially with Russia. Each time that a chorus of insistence is raised about unchanging values (and, relatedly, legal requirements for membership in) of the Council of Europe, their practical application in evaluating membership is diluted.<sup>110</sup> The irony is that an organization built on the dream of pan-European expansion put its central ethos at risk in pursuit of just that expansion. And Russia, "[w]ith love that turns to hate, and hate—to love,"<sup>111</sup> exposed more than any other applicant member the effects of that *sotto voce* change.

This article now turns to a close examination of the Russian application and the process that led to its controversial approval. In this process, Abram Chayes' perspective on the influence law may have on policy comes into full view.

### B. *The Practice of Enlargement: Russia*

It is worth pausing briefly to describe the admission process for the first five new members from Eastern Europe. The Committee of Ministers had (and has) the legal authority to decide who to invite as new members, but the Parliamentary Assembly has always played an important consultative role. This increased with eastward expansion.<sup>112</sup> Thus, the process began with a request from the Committee of Ministers for the opinion of the Parliamentary Assembly on a state's expressed interest in membership. The Assembly then requested an initial report from "eminent lawyers" and a subsequent report from its Committee on Political Affairs (itself aided by opinions from the Committee on Legal Affairs and Human Rights, and the Committee on Relations with

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<sup>109</sup> See, e.g., the recommendation issued in September 1991, calling upon "the Committee of Ministers of the Council of Europe to increase substantially the resources of the Organisation in order to make available to the central and republican authorities of the Soviet Union all constitutional, legal and other assistance for the consolidation of democracy as may be requested." EUR. PARL. ASS., *Crisis in the Soviet Union*, Recommendation 1161, ¶ 11 (1991).

<sup>110</sup> For example, Poland, the last country admitted to membership before Russia's own request to be a member, was given a conditional invitation subject to holding free general elections. See EUR. PARL. ASS., *Invitation to the Republic of Poland to become a member of the Council of Europe*, Resol. (90) 18 (Oct. 23, 1990). Thus, the value of pluralist democracy was put into effect as a rather watered-down requirement of membership. According to Hans Winkler, this was "the only time that the CM passed the resolution before the country concerned had shown it was a genuine parliamentary democracy through the holding of free elections." Winkler, *supra* note 27, at 156. The Committee on Legal Affairs and Human Rights had observed that the committee "has not yet had the time or opportunity to form an adequate idea of the situation in Poland." EUR. PARL. ASS., *Poland's application for membership of the Council of Europe*, Doc. 6307, ¶ 4 (Sept. 28, 1980). The rapporteur for the committee scathingly criticized the report of her opposite number on the Committee on Political Affairs and Democracy (Lord Geoffrey Finsberg) for a report that "says very little about human rights and nothing at all about such matters as whether Poland can accede to the European Convention on Human Rights." *Id.* Perusing that report reveals language more in the mode of lobbying for a predictive endorsement than a rigorous assessment of present qualifications. See EUR. PARL. ASS., *Poland's application for membership of the Council of Europe*, Doc. 6289 (Sept. 19, 1990).

<sup>111</sup> Aleksandr Aleksandrovich Blok, *The Scythians* (Alex Miller trans.), ALLPOETRY.COM (last accessed Oct. 24, 2023) ("That Sphinx is Russia. Grieving and exulting, / And weeping black and bloody tears enough, / She stares at you, adoring and insulting, / With love that turns to hate, and hate—to love.")

<sup>112</sup> Klein, *supra* note 8, §§ 3.33–3.41.

European Non-Member Countries).<sup>113</sup> These reports informed the Assembly's vote, which in turn was considered when the Committee of Ministers voted its decision.

That process entailed study visits, discussion, and negotiation between representatives of the Assembly and the prospective member state over months or years. And this consequently produced lists of reforms necessary to secure a positive opinion from the Political Affairs Committee.<sup>114</sup> The honoring of these commitments by applicant states to achieve various systemic reforms was then monitored after accession. Initially, this was done by the Legal Affairs and Human Rights Committee (reporting on the existence of institutions and laws needed to fulfill these commitments concerning the rule of law) and the Political Affairs Committee (reporting on the functional effectiveness of democratic pluralism in the state).<sup>115</sup>

Whether these commitments were legally binding obligations or promises enforceable only in political contexts is a contested question.<sup>116</sup> Applicants did not make these commitments in uniform ways; challenges to their non-performance also varied. But the commitments were undoubtedly influenced by the way that the organization's values were embedded in legal language, such as Article 3 of the Statute. Which commitments were extracted, and how important their fulfillment became, was shaped by the relationship these values had with the legal documents that expressed them. As Eckart Klein observed:

One may well assume that over time the requirements asked for by the Assembly, taken up by the commitments and affirmed by the [Committee of Ministers] have contributed to a refinement of the criteria of admission, and by the same token of membership, as enshrined in the Statute itself. Not the commitments as such, but their effect on the interpretation of the elements contained in Article 3 CoE Statute might be one of the most important legal developments in the context of the enlargement of the Council to the East.<sup>117</sup>

Here lies another parallel with the story told by Abram Chayes of his experience of law during the Cuban Missile Crisis. As Legal Advisor, Chayes was responsible for advising President Kennedy and what became known as the Executive Committee on international law relevant to the crisis. Those meetings,

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<sup>113</sup> The eminent lawyers were members of the control mechanism for the European Convention, either the Commission or Court, serving in their private capacities. Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 *TRANSNAT'L LAW & CONTEMP. PROBS.* 313, 328 (1998). Two good summaries of the entire process are: Andrew Drzemczewski, *The Council of Europe's co-operation and assistance programmes with Central and Eastern European countries in the human rights field: 1990 to September 1993*, 14 *HUM. RTS. L.J.* 229, 248 (1993); and Winkler, *supra* note 27, at 160.

<sup>114</sup> According to Leuprecht, "Experience has shown that it is at the pre-accession stage that the Council's representatives have the most leverage and can press for the reforms needed to bring the applicant country into line with the Council's standards." Leuprecht, *Innovations*, *supra* note 15, at 328.

<sup>115</sup> EUR. PARL. ASS., *Honouring of commitments entered into by new member states*, Order 488 (1993) (the so-called "Halonen Order." see Winkler, *supra* note 27, at 162-63); EUR. PARL. ASS., *Honouring of commitments*, *supra* note 12, ¶ 7. In 1997, both became the responsibility of a newly created Monitoring Committee. Eur. Parl. Ass., *Setting up of an Assembly committee on the honouring of obligations and commitments by member states of the Council of Europe (Monitoring Committee)*, Res. 1115 (1997).

<sup>116</sup> Klein, *supra* note 8, §§ 3.112-3.113.

<sup>117</sup> *Id.* § 3.113.

Chayes recounts, “were not dominated by debates on fine points of law. Nor would one have wished that they should be.”<sup>118</sup> But, by the same token, “the men responsible for decision did not ignore legal considerations. . . . The President and his advisers were properly concerned with the possibilities—for good or ill—in the situation they faced and in the courses open to them. Law and legal institutions played a part in defining and shaping those possibilities.”<sup>119</sup>

This changing relationship between the values of the Council embodied in its Convention and Statute, and the legal requirements for admission expressed or implied in those documents, is the central theme of the Council’s eastward expansion. Another theme is the disquiet in Strasbourg about the stakes eastward expansion held for the organization’s own prestige *vis-à-vis* the then European Communities. This was an anxiety that leaders in both the Council of Europe and the Soviet Union/Russia recognized and sometimes leveraged to their advantage. For example, in the aftermath of the violent crackdown by Soviet authorities in Vilnius and Riga in January 1991, which risked derailing efforts to expand ties between Strasbourg and Moscow, Soviet Foreign Minister Alexander Bessmertnykh sought to reduce tension by reference both to the Council of Europe’s values and to its ambitions:

The Soviet Union has a vital interest in a non-violent, peaceful, evolutionary and democratic process of change on the European continent. The fact is that we regard European stability geared to dialogue and co-operation as a key condition for perestroika’s success. But, inexorably, the relationship works both ways: without successful reform in the USSR, the building of a new Europe cannot succeed. A united, stable, economically healthy and politically confident Soviet Union is something Europe needs as much as we need a strong and united Europe.<sup>120</sup>

Russia’s application brought all these anxieties, tensions, and hopes together. The Soviet Union collapsed on Christmas Day 1991. But the creation of the Commonwealth of Independent States earlier that month and the signing of the Treaty of Maastricht in February 1992 gave a sense of urgency to the Council’s decision-making that it was both pushed by history and pressured by other regional forces to act quickly.

The Russian Federation lost no time indicating its intention to continue participating in Council of Europe Conventions, activities, and programs begun with the USSR. The Council, for its part, was content to accept Russia as successor to the Soviet Union.<sup>121</sup> In a letter dated January 7, 1992, from Russian Foreign Minister Andrei Kozyrev to Secretary-General Lalumière, Russia went further, emphasizing values:

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<sup>118</sup> CHAYES, *supra* note 1, at 100.

<sup>119</sup> *Id.* at 100–01.

<sup>120</sup> HUBER, *supra* note 80, at 48.

<sup>121</sup> See EUR. PARL. ASS., *Decision of the Committee of Ministers*, CM/Del/Concl (92) 472, at 25–26 (Mar. 23–27, 1992). The Russian Federation Supreme Soviet (as it was then called) was granted special guest status at the Parliamentary Assembly on January 14, 1992, since the status accorded to the legislative branch of the Soviet Union could be said to have ceased existence when the USSR did. EUR. PARL. ASS., *Report on Russia’s request for membership of the Council of Europe*, Doc. 7443, at 6 (Jan. 2, 1996) [hereinafter *Report on Russia’s request*].



The new Russia wholeheartedly shares the priority principles underlying the action of the Council of Europe – pluralistic democracy, human rights and the rule of law – and has been consistently applying them in its policy during recent years. On the basis of these principles it is ready to continue increasingly to develop co-operation with the Council of Europe in the widest variety of fields with the aim of becoming a full member of the Council of Europe.<sup>122</sup>

Kozyrev's claim of consistent application of these values was dubious at best. But the signal was clear: Russia wanted in. Just four days prior to this letter, the Russian Federation Supreme Soviet sought the special guest status that had previously been held by the USSR Supreme Soviet.<sup>123</sup>

1. *The Committee of Ministers requests the opinion of the Parliamentary Assembly*

The Committee of Ministers met with Kozyrev in Strasbourg on May 7, 1992, to receive Russia's formal application to join the Council of Europe. At its morning meeting that day, which included a general discussion of the growing list of candidate countries, all those who specifically referenced Russia in their opening statements agreed on the importance of maintaining strict adherence to the values-laden requirements for membership.<sup>124</sup> Kozyrev began his afternoon remarks by claiming those values as "the very values which the Russian people fought for on last August's barricades and which they are now striving to incorporate into their everyday lives."<sup>125</sup> This stated support for those values revealed their merely aspirational quality in Russia. Likewise, his closing words both reinforced the point that the Council and Europe had reciprocal

<sup>122</sup> EUR. PARL. ASS., *Secretariat discussion paper of the Comm. of Ministers*, Doc. No. (92) 9, at 9 (Jan. 20, 1992).

<sup>123</sup> *Id.* at 7.

<sup>124</sup> EUR. PARL. ASS., *Minutes of the 90th Session of the Committee of Ministers*, 90th Sess., CM (92) PV1, PV2 and PV3 at 13, 30, 34, 44, 48, 37 (May 7, 1992) (statement of Durão Barroso, Portugal: "In the context of our Organisation's enlargement, which is a direct result of the fall of communist totalitarianism, we must uphold the standards which have led the Council of Europe to become a symbol of the democratic ideal. Any relaxation of those standards would not benefit in the end either the Council of Europe or the States engaged in building and consolidating democratic institutions;" statement of Stirn, France: "How do we set about this? Firstly, without compromising on the values we were founded to uphold, we must welcome in, now that the Council is set to be a Council of Europe in the real geographical (or rather geopolitical) sense of the name, all the European countries which recognise the principles of pluralist democracy, human rights and the Rule of Law;" statement of Daly, Ireland: "While we are happy to hold out the prospect of accession to these new States, we are also conscious that accession will require a sufficient apprenticeship in the Council of Europe system, if its standards are to remain meaningful. This is the spirit in which my delegation views Russia's membership application.;" summarized statement of Schäfer, Germany: "This request [Russia's] should be viewed and studied in the light of progress on the Council of Europe's fundamental principles;" summarized statement of Poos, Luxembourg: "However, it was clear that the Russian Federation had to fulfil the same conditions as the other member States. There could be no question of lowering the level of legal protection guaranteed by the Council of Europe." An outlier was Belgium, *see* statement of Claes, Belgium: "[I]t is essential in our view to maintain the statutory requirements of our Organisation concerning the application of democratic values and human rights. It is, however, obvious that our action will also be guided by our assessment of the political desirability of providing a mooring within our Organisation for still imperfect or uncertain democratisation processes, with a view to making them irreversible.")

<sup>125</sup> *Id.* at 72.

needs: “Without the support of a Europe rich in democratic experience, it will be harder for Russian democracy to stand on its own feet. Without a strong, stable and democratic Russia, there can be no new Europe.”<sup>126</sup> This was the same paradox, from Russia’s perspective: Russia needed to be part of Europe, and Europe had reasons to welcome Russia’s inclusion, but the values that underscored those twin needs were at that point much more dream than reality in the country Foreign Minister Kozyrev represented.

Russia’s request for accession was on the agenda for the Committee of Ministers’ Deputies, which met in late June.<sup>127</sup> Although keeping with long-standing practice to seek the opinion of the Parliamentary Assembly before inviting a state to join the Council of Europe, the resolution they passed nevertheless put a thumb on the scales. The Resolution expressed the Committee’s aim of “facilitating and accelerating the Russian Federation’s transition to democracy, and enabling it to join the Council of Europe as soon as possible.”<sup>128</sup>

On the one hand, the Resolution ceded the well-established proposition (Poland’s recent admission notwithstanding) that admission could only happen “as soon as the conditions laid down in the Statute . . . have been satisfied.”<sup>129</sup> That is, “implementation of the principles of pluralist parliamentary democracy, respect for human rights and the rule of law.”<sup>130</sup> On the other hand, the Committee expressed sympathy for the view (attributed to Kozyrev in his meeting in Strasbourg the month prior) that “it will take time to translate theoretical freedoms into actual practice, and more especially to improve conditions for their respect in Russian administration and society.”<sup>131</sup>

What did this mean? At a minimum, it seemed to suggest a willingness to be patient. But did it mean patient in waiting for the conditions to be met before offering membership, or a softening of the standards these values had previously been held to demand? Evidence for the latter conclusion can be found in the admission of new members between the lodging of Russia’s application and the Council’s invitation four years later.

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<sup>126</sup> *Id.* at 75.

<sup>127</sup> EUR. PARL. ASS., *Conclusions of the 478th Meeting of the Ministers’ Deputies*, CM/Del/Concl (92) 478, at 116 (Jun. 22–25, 1992) [hereinafter *Conclusions of the 478th Meeting*].

<sup>128</sup> EUR. PARL. ASS., *on the Russian Federation*, Res. (92) 27 (June 25, 1992) [hereinafter *on the Russian Federation*]. The Committee of Ministers seemed itself to be aware of the political liabilities if it were perceived to be hurrying things along. See EUR. PARL. ASS., *Conclusions of the 478th Meeting of the Ministers’ Deputies*, CM/Del/Concl 478, at 41 (June 22–25, 1992) (Discussion of the communication to be sent to the Parliamentary Assembly included agreement that it “would be mistaken to appear to give lessons to the Parliamentary Assembly.” The United Kingdom agreed that “*fortitur in re, suavitur in modo* should characterise the transmission of this message.”).

<sup>129</sup> EUR. PARL. ASS., *on the Russian Federation*, *supra* note 128.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* Notes from the meeting that adopted the resolution show that the deputies agreed to omit from a letter accompanying the resolution a sentence conceding that “the process of democratic reform and adaptation of the Russian Federation’s institutional and legal system may well be a lengthy and complex one.” EUR. PARL. ASS., *Conclusions of the 478th Meeting*, *supra* note 127, at 41.

## 2. *The Parliamentary Assembly's eminent lawyers and rapporteurs get to work*

After the Committee of Ministers' resolution was sent to the Parliamentary Assembly, the latter appointed rapporteurs and eminent lawyers to conduct its work.<sup>132</sup> The rapporteurs for the three committees involved were Ernst Mühlemann (Political Affairs), David Atkinson (Relations with European Non-Members), and Ole Espersen (Legal Affairs and Human Rights).<sup>133</sup> These chairmen were highly accomplished and respected politicians. Mühlemann, a director of Union Bank of Switzerland (now UBS), was known as “shadow foreign minister” in his native Switzerland.<sup>134</sup> Atkinson was a conservative UK politician whose work with Russian dissidents began in the 1980s.<sup>135</sup> Espersen, a former Danish Minister of Justice and law professor,<sup>136</sup> left the Assembly in November 1994.<sup>137</sup> He was replaced by Rudolf Bindig of Germany.<sup>138</sup> But Espersen's last report, “on measures to dismantle communist totalitarian systems,” presciently observed: “The transition from a communist regime to genuine democracy is like walking a tightrope.”<sup>139</sup>

The process also called for the appointment of “eminent lawyers” seconded from their work in the Convention's enforcement mechanisms.<sup>140</sup> Six were selected, three each from the European Court for Human Rights and the European Commission for Human Rights. From the former came Rudolf Bernhardt, Franz Matscher, and Luzius Wildhaber; from the latter, Felix Ermacora, Stefan Trechsel, and Albert Weitzel.<sup>141</sup> All were distinguished; two (Bernhardt and Wildhaber) rose to the presidency of the Court.

Four of the eminent lawyers and the three rapporteurs visited Russia in these capacities on multiple occasions in the spring, summer, and fall 1994.<sup>142</sup> The

<sup>132</sup> EUR. PARL. ASS., *Present State of Relations with the Russian Federation*, SG/INF (94) 12, at 2 (May 6, 1994).

<sup>133</sup> *Id.*

<sup>134</sup> Ernst Mühlemann, «Schattenausminister» ist gestorben, 20 MINUTEN (Sept. 13, 2009), <https://www.20min.ch/story/schattenausminister-ist-gestorben-614855414460> [<https://perma.cc/4QYB-VBAA>].

<sup>135</sup> David Atkinson; *Obituaries Tory MP who championed the cause of Christian dissidents in the Soviet Union*, THE DAILY TELEGRAPH (Feb. 13, 2012), <https://www.telegraph.co.uk/news/obituaries/politics-obituaries/9077814/David-Atkinson.html#:~:text=David%20Atkinson%2C%20who%20has%20died,dissidents%20in%20the%20Soviet%20Union> [<https://perma.cc/3CKB-HWGD>].

<sup>136</sup> Tidligere justitsminister Ole Espersen er død - 85 år, BERLINGSKE (Dec. 5, 2020), <https://www.berlingske.dk/politik/tidligere-justitsminister-ole-espersen-er-doed-85-aar> [<https://perma.cc/S6RU-53Z9>].

<sup>137</sup> *Mr Ole ESPERSON (Denmark)*, EUR. PARL. ASS., <https://pace.coe.int/en/members/2924/espersen> (last visited Oct. 6, 2023).

<sup>138</sup> Abgeordnete, DEUCHER BUNDESTAG, <http://webarchiv.bundestag.de/archive/2007/0206/mdb/mdb15/bio/B/bindiru0.html> [<https://perma.cc/CRJ6-GNRB>] (last visited Oct. 6, 2023).

<sup>139</sup> EUR. PARL. ASS., *REPORT on measures to dismantle communist totalitarian systems*, Doc. 7209 ¶ 2 (Jan. 3, 1995).

<sup>140</sup> EUR. PARL. ASS., *Present State of Relations with the Russian Federation*, *supra* note 132, at 2; *see also* Rudolf Bernhardt, Stefan Trechsel, Albert Weitzel and Felix Ermacora, *Report on the conformity of the legal order of the Russian Federation with Council of Europe Standards*, Doc. AS/Bur/Russia (1994) 7, at 1 (Sept. 28, 1994), *reprinted in* 15 HUM. RTS. L. J. 249, 250 (1994).

<sup>141</sup> EUR. PARL. ASS., *Present State of Relations with the Russian Federation*, *supra* note 132, at 2.

<sup>142</sup> EUR. PARL. ASS., *Report on Russia's request*, *supra* note 121, at 6–7 (Bernhardt, Ermacora, Trechsel, and Weitzel visited in May and June 1994. Mühlemann, Atkinson, and Bindig visited in June, October, and early November 1994).

work of the lawyers was the first to see the light of day with a “Report on the conformity of the legal order of the Russian Federation with Council of Europe standards.”<sup>143</sup> The report was published in late September 1994, almost three years since Russia’s application for membership.<sup>144</sup>

Citing Article 3 of the Statute, the report identified “being a genuine democracy showing respect for the rule of law and human rights” as a prerequisite for membership.<sup>145</sup> In other words, aspiring to those values was not enough, nor was membership *sans* those requirements a legitimate vehicle, legally speaking, to achieve them. The experts underscored that they were “not asked to utter an opinion on the political question whether the Russian Federation ought to be admitted to the Council of Europe.”<sup>146</sup>

The report made for very grim reading. Following nearly forty pages of empirical evidence, the report concluded that although Russia “has embarked upon the road towards democracy” the country had “not yet fully reached the goal of that journey and the obstacles which lay ahead are great and manifold.”<sup>147</sup> As to the rule of law, Russia’s accomplishment in that area “seems to be more theory than practice. . . . The traditional authoritarian thinking still seems to be dominant in the field of public administration. . . . [and] the concept that it should in the first place be for the judiciary to protect the individuals has not yet become a reality in Russia.”<sup>148</sup> Thus, “the rule of law is not established in the Russian Federation.”<sup>149</sup> The protection of human rights presented a mixed bag of progress.<sup>150</sup> But, on the whole, the experts’ conclusion was, again, negative: “[T]he Russian Federation does not (yet) fulfil the condition ‘of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.’”<sup>151</sup>

In sum, three years after its application, Russia did “not, at the present moment, meet the Council of Europe standards as enshrined in the Statute of the Council and developed by the organs of the European Convention on Human Rights.”<sup>152</sup> But the rapporteurs’ and eminent lawyers’ work then came to a grinding halt, stopped by the first Chechen war, which exploded in full force in December 1994.<sup>153</sup>

<sup>143</sup> EUR. PARL. ASS., *Report on the conformity of the legal order of the Russian Federation with Council of Europe standards*, Doc. AS/Bur/Russia (1994) 7, at 1 (Sept. 28, 1994).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* § VI, ¶¶ 1–2.

<sup>146</sup> *Id.* § VI, ¶ 2.

<sup>147</sup> *Id.* § VI, ¶ 5.

<sup>148</sup> *Id.* § VI, ¶ 6.

<sup>149</sup> *Id.* § VI, ¶ 7.

<sup>150</sup> *Id.* § VI, ¶¶ 8–10 (The most positive thing the experts could say was that they lacked evidence of persecutions for political or religious expression or discrimination on the basis of nationality. But as to other rights, such as freedom of movement or property, the experts found that “large cities, in particular Moscow, seem simply to ignore the Constitution.” Pre-trial detention conditions were “degrading if not even inhuman.” “The guarantee of individual liberty is far behind the requirements of Article 5” of the Convention and “fairness of criminal proceedings is not effectively guaranteed” on the whole.).

<sup>151</sup> *Id.* § VI, ¶ 12.

<sup>152</sup> *Id.* § VI, ¶ 13.

<sup>153</sup> Chechnya, an Autonomous Soviet Socialist Republic (ASSR) in the federal façade of the Soviet Union, had declared independence in October 1991. Russian leader Boris Yeltsin had encouraged units of the USSR to declare sovereignty during his struggle with Gorbachev. The fifteen Soviet Socialist Republics (SSR) in the highest tier of Soviet federalism succeeded in becoming sovereign states, and even members of the Council of Europe (such as Estonia and Lithuania). But Chechnya had sought exit from Russia, not just the Soviet Union, and this brewed first a simmering conflict that then boiled into war. See KAHN, *supra* note 78, at 94–103.

The PACE committees, however, expressed two very different views about what to do. Their reactions traced the larger dilemma of Russian membership. Mühlemann's Committee on Political Affairs accepted that "[u]ntil the Chechnyan conflict is solved peacefully, Russia's admission procedure cannot be continued."<sup>154</sup> But this conclusion was ambivalent about whether a full cessation of hostilities was even required to begin the process again.<sup>155</sup> And the report in no way questioned the ultimate goal:

The Chechnyan conflict will doubtlessly considerably slow down Russia's accession but should not definitively prevent it. By integrating Russia in the Council of Europe, it will be possible to detect similar conflicts at an earlier stage and resolve them. This should also prevent a destabilisation of Russia and possible civil war, which would have dangerous consequences for all of Europe.<sup>156</sup>

The anticipation of "similar conflicts"—a euphemism for a Russian air and ground assault in the process of leveling the city of Grozny to rid itself of a warlord—was hardly an optimistic appraisal of Russia's embrace of the values embedded in the Convention and Statute. If nothing else, democratic pluralism, human rights, and the rule of law at least implied something short of the ruthless violation of the laws of war to suppress domestic opposition, even insurrection.

But the Committee seemed to see Russia as a special case. Not only did its immense size and historical stature represent a distinct challenge, but the conflict in the Caucasus—an increasingly violent insurrection that was the product of the dissolution of the Soviet empire—was not one easily resolved. The role of these values, for this committee, seemed to be aspirational: their development would be an achievement *through* membership, not criteria *for* membership. The Council could only build these foundations once Russia was a member.

Bindig's Committee on Legal Affairs and Human Rights was much more critical. For this committee, a certain minimum respect for the values of the Council were *sine qua non* for admission, foundations on which to build and not foundations to be built. The Committee recommended that the Assembly suspend further examination of Russia's prospective membership "until it is convinced that the Russian Federation has secured respect for human rights in Chechnya, since membership is conditioned on the enjoyment by all persons within a member's jurisdiction of human rights and fundamental freedoms, according to the Council of Europe's Statute."<sup>157</sup> The recommendation was couched in legal terms and references, but the source of the obligation was the same as the values laid out in the preamble to the Convention. The Committee went out of its way to call out the Russian violations of international

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<sup>154</sup> EUR. PARL. ASS., *On Russia's request for membership in light of the situation in Chechnya*, 1st Sess., Doc. No. 7229 (1995).

<sup>155</sup> *Id.* ¶ 16 ("Only when a comprehensive report of the Russian President, the Government and the Parliament clearly indicates how the Chechnyan conflict will be ended, and its consequences remedied, can the procedure be taken up again.").

<sup>156</sup> *Id.* ¶ 18.

<sup>157</sup> EUR. PARL. ASS., *On Russia's request for membership in light of the situation in Chechnya*, 1st Sess., Doc. No. 7231 (1995).

humanitarian and human rights law as “never justifiable” and while categorically stating that it “firmly condemns” violations by both parties to the conflict, noted in particular that it was “shocked” by the behavior of the Russian leadership.<sup>158</sup>

What was it about these two committees, confronted by the same cold facts and representing the same institutional values, that resulted in such different conclusions? The difference is one that Abram Chayes would have recognized. He strongly rejected the criticism that legal analysis in international affairs of state is just “something cooked up after the event, by lawyers who had no part in the decision, to justify a course of action chosen essentially on other grounds.”<sup>159</sup>

A committee tasked to apply law to facts operates differently than one considering only policy preferences and other implications of its choices. Chayes analogized to the work of a domestic court, the “ordinary judicial opinion” of which “does not recapitulate the actual process by which the court reached its decision, much less the underlying psychological motivation of individual judges.”<sup>160</sup> But recognizing that policy interests affect judges:

[This] does not mean, however, that the judicial opinions filling the law books are a sham. The requirement of a published opinion imposes on the court the discipline and check of the necessity to formulate its decision in terms of the set of legal rules and procedures within which the case is presented for determination . . . . The judicial opinion cannot prove that the decision is right . . . . But, if there can be no determinate answer, analysis and criticism can nevertheless distinguish a persuasive from a specious rationale, a responsible and serious performance from a trivial one. In this way, the requirement of justification provides an important substantive check on the legality of action and ultimately on the responsibility of the decision-making process.<sup>161</sup>

That was the influence of law on values. And the departure that these committees made from each other was one that would repeat throughout the process of evaluating Russia’s application for admission.

The Parliamentary Assembly suspended the consideration of Russia’s application and left open the date as well as the basis for restarting the process.<sup>162</sup> Its resolution “unreservedly” condemned the Russian military for its “indiscriminate and disproportionate” use of force and considered the state responsible for “a grave violation of the Council of Europe’s most elementary human rights principles.”<sup>163</sup> These included the lack of control by both the parliament and executive branch over the military, “contrary to our

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<sup>158</sup> *Id.* ¶ 4. (emphasis in original).

<sup>159</sup> CHAYES, *supra* note 1, at 41.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 41–42.

<sup>162</sup> EUR. PARL. ASS., *Russia’s request for membership in the light of the situation in Chechnya*, 1st Sess., Res. No. 1055 (1955).

<sup>163</sup> *Id.* ¶¶ 2–3.

Organization's standards on democracy and the rule of law."<sup>164</sup> At the same time, the Parliamentary Assembly favored "continued dialogue" with Russia, preserving the special guest status for the Russian parliament and expressing support for the continuation of its democracy and human rights-building assistance programs.<sup>165</sup>

Interestingly, the Parliamentary Assembly ordered only the Committee on Legal Affairs and Human Rights (not the Political Affairs Committee that led the membership process) to visit Chechnya and report on the observance of human rights after the end of hostilities.<sup>166</sup> Mr. Bindig's report at the end of June 1995 was scathing.<sup>167</sup> Russian violations of international humanitarian law were widespread and "might even be classified as deliberate policy."<sup>168</sup> Arbitrary arrests and lengthy detentions, as well as "disappearances" and torture of civilians was widespread and without any legal basis.<sup>169</sup> And, with auguries of the large number of Chechen cases that would be filed in the European Court in the future, "in principle there seems to be no investigation or prosecution of human rights abuses committed by Russian Federal forces against the Chechen population, neither through military discipline, nor through the ordinary judicial system."<sup>170</sup> In short, the report concluded that "the human rights situation in Chechnya is unsatisfactory and unacceptable."<sup>171</sup>

A peace agreement at the end of July 1995 led to the re-opening of the question of proceeding with Russia's request. Bindig's report for the Committee on Legal Affairs and Human Rights remained as critical as before. His report's conclusion was that this fragile peace was enough to allow the procedure for accession to be reopened.<sup>172</sup> But the result of that process seemed to be even more in doubt:

While there may be some positive signs of improvement in the development of democracy (upcoming parliamentary and presidential elections, etc.), development in the area of the protection of human rights and the rule of law seems to have gone backwards, if anything. Particular areas of concern are the following: newly adopted legislation granting the secret services more powers than are compatible with a state based on the rule of law, little or no accountability in the armed forces . . . threats to press freedom, a largely unreformed judiciary and prosecutor's office leading to a malfunctioning of the courts and miscarriages of justice (and even allegations of new show trials),

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<sup>164</sup> *Id.* ¶ 4.

<sup>165</sup> *Id.* ¶ 7.

<sup>166</sup> EUR. PARL. ASS., *Russia's request for membership in light of the situation in Chechnya*, 1<sup>st</sup> Sess., Doc. No. 506 (1995).

<sup>167</sup> It should be noted that the report was highly critical of both the Russian and Chechen side.

<sup>168</sup> *Report of the Committee on Legal Affairs and Human Rights on the "Human Rights Situation in Chechnya,"* ¶ 30 (Jun. 29, 1995).

<sup>169</sup> *Id.* at 16, ¶ 54.

<sup>170</sup> *Id.* at 20, ¶ 69.

<sup>171</sup> *Id.* at 23, ¶ 77. The Report did not opine on Russia's membership because Resolution 1055 (1995) "suspended the procedure concerning the Assembly's statutory opinion" on that request. *Id.* at 22, ¶ 74.

<sup>172</sup> EUR. PARL. ASS., *On Procedure for an opinion on Russia's request for membership of the Council of Europe*, 4<sup>th</sup> Sess., Doc. No. 7384 (1995).

a dismal prison system . . . and a questionable treatment of internally displaced persons and refugees.<sup>173</sup>

By comparison, the draft resolution advanced by Ernst Mühlemann's report for the Political Affairs Committee accentuated the positive and emphasized the opportunity for the Council of Europe to play a role in Russia's "state of radical transition."<sup>174</sup> The draft conceded that progress "measurable against the highest European standards will not be constant and will take many years."<sup>175</sup> The report itself was even willing to accept that "border disputes of varying intensity" and other conflicts "within Russia itself" were possible: "Such is the heritage of dictatorships."<sup>176</sup>

The Political Affairs Committee view ultimately won the day: its draft resolution to resume the membership process was adopted a fortnight later.<sup>177</sup> Whereas the Legal Affairs Committee and the eminent lawyers put Russia up against the standards for admission—values embodied in the law of the Convention and the Council's Statute—and found Russia profoundly lacking, the Political Affairs Committee perceived in the same facts an urgent need for action. Thus, the resolution it successfully proposed expressed the view that "the Assembly has no wish to throw in doubt the long-term direction of this transition: towards democracy, the rule of law, and human (including social) rights and freedoms."<sup>178</sup>

This all seemed to get the process for admission precisely backward. Criteria for membership became goals to be accomplished as the fruits of membership. It was this reorientation that convinced Peter Leuprecht to resign in protest. Whether that was the right policy is not the point of this paper. What should be noted is the very Chayesian way that law influenced that policy and structured political choices through a legal medium.

The Convention's aim of "greater unity between . . . countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law" was hard to square with membership of the successor state to the Soviet Union.<sup>179</sup> Article 3 of the Statute took the values that heritage impliedly embraced (in the words of the Convention, "political democracy" and "a common understanding and observance" of human rights) and made them legal prerequisites subject to the legal test in Article 4.<sup>180</sup>

There was ambiguity in that test: Is a state "deemed to be able and willing to fulfil the provisions of Article 3" required presently to fulfil them, or does the test merely require a credible commitment to doing so in the future?<sup>181</sup> That opened room for politics. But the politics was channeled through law in a way that Chayes, albeit in far different circumstances, argued had a valuable

<sup>173</sup> *Id.* ¶ 8.

<sup>174</sup> EUR. PARL. ASS., *Procedure for an opinion on Russia's request for membership of the Council of Europe*, 4th Sess., Doc. No. 7372 (1995).

<sup>175</sup> *Id.* ¶ 9.

<sup>176</sup> *Id.* ¶ 16.

<sup>177</sup> EUR. PARL. ASS., *On Procedure for an opinion on Russia's request for members of the Council of Europe*, 4th Sess., Doc. No. 1065 (1995).

<sup>178</sup> *Id.* ¶ 8.

<sup>179</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble, Nov. 4, 1950, Eur. T.S. No. 5.

<sup>180</sup> Statute of the Council of Europe, Art. 3, May 5, 1949, Eur. T.S. No. 1.

<sup>181</sup> Statute of the Council of Europe, *supra* note 7, at Art. 4.



legitimizing effect. As Chayes also argued, legal requirements often have an organizational component: decision-making occurs according to certain procedures and values certain forms of evidence and argument. Whatever can be said of the final opinion of the Parliamentary Assembly and decision of the Committee of Ministers (to which this paper turns next), the way law concretized values into discernable, discrete commitments to engage in various reforms should be recognized. Politics might have extracted various concessions from a hopeful applicant; law provided a tool for their measurement.

### 3. *The Parliamentary Assembly's Opinion and the Committee of Ministers' Decision*

Four years passed between Russia's application and the Committee of Ministers' invitation. While the admissions process remained the same, and institutional values were dutifully reaffirmed, the standards for applying them had changed. For example, Estonia was admitted despite substantial concerns about the protection of a sizeable Russian linguistic minority lacking Estonian citizenship. A commitment by Estonia to protect their political rights was enough for the Parliamentary Assembly to recommend its invitation (though the commitment was only partially fulfilled).<sup>182</sup> Romania was recommended for admission despite the Assembly's conclusion that numerous legislative changes were required, *inter alia*, for an independent judiciary, minority rights, and "the necessity of instituting separation of powers, guaranteeing the real independence of the media, and ensuring the conditions for the free functioning of local administrative bodies."<sup>183</sup> The Committee on Legal Affairs and Human Rights supported admission, though its report was quite critical:

However, much remains to be done, especially in the implementation of fundamental rights and freedoms and the rule of law. This is nothing short of simple and may require a certain amount of time. It may be relatively easy to change the law but it is much more difficult to change traditions and mentalities at all levels of society, particularly administration and officials . . . . One may ask whether there are any guarantees that Romania will respect the principles and the basic legal texts of the Council of Europe once it has become a member of the Organisation. There is also much concern about the fact that many of those who hold the highest positions in the state already had senior positions under the Ceausescu regime. Have these persons now suddenly become convinced democrats and are they prepared to respect and to defend the human rights of their fellow citizens under difficult circumstances?<sup>184</sup>

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<sup>182</sup> EUR. PARL. ASS., *Application of the Republic of Estonia for membership of the Council of Europe*, 44th Sess., Op. No. 170, at 5 (1993) (noting that the Assembly "expects the Estonian authorities to base their policy regarding the protection of minorities on the principles laid down in Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights"). For its partial fulfillment, see Winkler, *supra* note 27, at 158–59.

<sup>183</sup> EUR. PARL. ASS., *Application by Romania for members of the Council of Europe*, 44th Sess., Op. No. 176 (1993).

<sup>184</sup> EUR. PARL. ASS., *Application by Romania for Membership of the Council of Europe*, 44th Sess., Doc. No. 6918 (Sept. 20, 1993).

Hardly a ringing endorsement of the prerequisite entrenchment of the values expected by the Convention or the Statute. But the Committee had reached the conclusion, “that as a means of pressure, the admission procedure has done its work and that the Council of Europe, in the future, will be more effective in obtaining improvements in the situation if Romania is a member of the Organisation.”<sup>185</sup>

Following the admission of Estonia, Lithuania, and Slovenia in May 1993, and the readmission of the now separate Czech Republic and Slovakia in June, the Council of Europe reaffirmed its commitment to its values two days after admitting Romania as a new member. This came in the form of a declaration published at the conclusion of the Council of Europe Summit in Vienna on October 9, 1993.

But a close reading of the Vienna Declaration reveals some subtle changes. The Council’s members were no longer described as “like-minded” or sharing “a common heritage of political traditions, ideals, freedom and the rule of law” as found in the Convention. Rather, the Declaration noted the members were “committed” to those things, but highlighted “a common cultural heritage enriched by diversity.”<sup>186</sup> Further, while Article 4 of the Statute required members to be “deemed to be able and willing to fulfill” the requirements of Article 3, which in turn required acceptance of rule-of-law and human rights principles, the Declaration stated that accession now “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.”<sup>187</sup>

Alignment with basic principles seemed a category shift from an ability and willingness to fulfil them. In other words, what was needed for accession was a commitment to “basic principles” in the most formal sense of institutions and promulgated laws. Beyond that formalism, the “common heritage” of “like-minded” states was no longer the *sine qua non* of membership. Logically, it could not be, for the next lines of the Declaration referenced the need “to promote the integration of new member States” and “to assist the democratic transition” in ways “constantly adapted to the needs of our new partners.”<sup>188</sup>

Thus, when the work of the rapporteurs, their committees, and the eminent lawyers had been done, it was presented to political bodies whose perspective had shifted. International politics had shifted, too, as had Russia’s own assertions of its military power. The Balkan peninsula was engulfed in violence. The Russian 14th Army sat watch in Transnistria, territory recognized as part of Moldova (which had joined the Council of Europe in July 1995). Russia’s Black Sea fleet remained at its port on the Crimean Peninsula, presenting a simmering and tense situation for Ukraine, the newest member of the Council of Europe.

The settlement of those issues were all recommendations made by Mühlemann’s Political Affairs Committee. That committee also recommended a host of other assurances and commitments involving new legislation, the signing and ratification of Council of Europe treaties (including the European

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<sup>185</sup> *Id.*

<sup>186</sup> EUR. COUNCIL., *Vienna Declaration* (Oct. 9, 1993).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

Convention and its protocols), and more wide-ranging and less concrete promises of legal and political reform.<sup>189</sup> Russian authorities agreed to them all.

Mühlemann's conclusions, as previously, were future oriented. Russia "is making progress towards becoming a state based on the rule of law."<sup>190</sup> Judicial independence "should be strictly respected and decisions should be taken on a purely legal basis."<sup>191</sup> That progress should not be risked; the perfect was the enemy of the good. "Russia does not yet meet all Council of Europe standards. However, integration is better than isolation; co-operation is better than confrontation."<sup>192</sup>

Also true to form, Rudolf Bindig's Committee on Legal Affairs and Human Rights took a more critical tone and made a harsher appraisal of progress. Needed legislation was either lacking or of poor quality. Worse, "where good legislation exists—for example the Constitutional catalogue of rights and freedoms—it is often simply not applied."<sup>193</sup> This reflected that the Soviet "mentality towards law has not yet changed," a claim asserted "for every echelon of the Russian state administration" from the President on down.<sup>194</sup> The report continued in this vein for a variety of discrete topics including the criminal justice system, the death penalty, and the security services. This committee's conclusion was that Russia "does not yet fulfil the conditions of membership as laid down in Article[s] 3 and 4 of the Statute of the Council of Europe."<sup>195</sup> What progress there had been "is often frustratingly slow, and sometimes even goes into reverse."<sup>196</sup>

With these conclusions before them, the Parliamentary Assembly voted 164-35 in favor of Russia's membership on January 25, 1996.<sup>197</sup> The debate was contentious and mostly focused on fears about the Russian and regional repercussions of denying membership. Ernst Mühlemann warned of "a second Balkans" in the Caucasus and predicted that Russia would become "more aggressive" if left outside the Council.<sup>198</sup> David Atkinson took a more reassuring tone; if Russia "failed to fulfil its obligations," the Council could suspend its membership.<sup>199</sup>

The debate took place just months before Russia's presidential elections, in which Yeltsin's second term seemed seriously threatened by Gennady Zyuganov's Communist Party. A lack of support for Russia in the Council seemed to increase the danger that he would lose. Ultra-nationalist Vladimir Zhirinovskiy, "[h]is face flushed, his finger wagging menacingly," offered an unsubtle warning: "If you vote against Russia today I will be grateful to you. It will be a gift to my party for the next presidential elections. Every time I tell Russians how much western Europe hates them they vote for me."<sup>200</sup>

<sup>189</sup> EUR. PARL. ASS., *Report on Russia's request*, *supra* note 121.

<sup>190</sup> *Id.* § 6, ¶ 103(i).

<sup>191</sup> *Id.* § 6, ¶ 103(v).

<sup>192</sup> *Id.* § 6, ¶ 103(xii).

<sup>193</sup> EUR. PARL. ASS., *On Russia's application for membership to the Council of Europe*, 1<sup>st</sup> Sess., Doc. No. 7463 II (1996).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* § VIII.

<sup>196</sup> *Id.*

<sup>197</sup> Caroline Southey, *Council of Europe votes Russia in*, FINANCIAL TIMES (UK), Jan. 26, 1996.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

Those who did consider Russia's admission on the merits hardly interpreted the record in similar ways. A Ukrainian parliamentarian, Evgen Marmazov, argued for membership primarily on a *tu quoque* rationale: "We have accepted a series of countries that did not comply with the host of standards set down by the Assembly. A similar approach should be applied to Russia."<sup>201</sup> On the other side, Swiss parliamentarian Dumeni Columberg considered it a "dreadful illusion that an enormous empire such as Russia could be reformed in only five years and that democracy would succeed so easily. It was a further illusion that the weak monitoring of the Council of Europe could ensure that Russia honored its commitments."<sup>202</sup>

The Committee of Ministers invited Russia to become a member of the Council of Europe on February 8, 1996. Its resolution, noting the favorable opinion of the Parliamentary Assembly, observed "with satisfaction that the Russian Federation complies with the conditions laid down in Article 4 of the Statute."<sup>203</sup> But this was not exactly what the Parliamentary Assembly's opinion said. It did not take a close reading to see the change that paved the way for Russia to join. In fact, it followed the same aspirational approach and tone as the creation of a special guest status had used for the Soviet Union in 1989. Eight years later, hope still sprang eternal:

On the basis of these assurances and of the following considerations and commitments, the Assembly believes that Russia—in the sense of Article 4 of the Statute—is clearly willing and will be able in the near future to fulfil the provisions for membership of the Council of Europe as set forth in Article 3 . . . .<sup>204</sup>

In other words, the Parliamentary Assembly's opinion was that Russia should be invited to become a member of the Council because it did not meet the requirements of membership. Perhaps the most ominous response to this elision of fact and aspiration came from the Russian human rights community itself, which condemned the move as premature. Notable among them was Sergei Kovalyov, who resigned from the Kremlin's human rights commission in protest of "decisions which—instead of strengthening the rule of law in a democratic society—have revived the blunt and inhumane might of a state machine that stands above justice, law, and the individual."<sup>205</sup> His letter was dated two days before the Parliamentary Assembly recommended that Russia join the Council of Europe.

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> EUR. COUNCIL: COMMITTEE OF MINISTERS, *Invitation to the Russian Federation to become a member of the Council of Europe*, Resolution 96(2) (Feb. 8, 1996).

<sup>204</sup> EUR. PARL. ASS., *Application by Russia for membership of the Council of Europe*, 1<sup>st</sup> Sess., Op. No. 193 (1996).

<sup>205</sup> Sergei Kovalev, *A Letter of Resignation*, THE N.Y. REV. OF BOOKS (C. Fitzpatrick trans., Feb. 29, 1996); Stephanie Baker, *Russia to Officially Join Council of Europe*, RADIO FREE EUROPE / RADIO LIBERTY (Feb. 9, 1996).

## CONCLUSION

It is much easier to speak about an institution's values than to put them into practical effect. In May 1989, on the eve of the end of the Cold War, François Mitterrand addressed the Parliamentary Assembly on the occasion of its fortieth anniversary:

For the war generation, the foundation of the Council of Europe represented, so soon after the end of hostilities, resounding recognition of the supremacy of our democratic values over totalitarianism. The birth of the Council of Europe was seen as an act of faith in a Europe pledged to human rights, as an appeal for reconciliation and for unity in Europe.

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Europe's identity, what gives our continent its impact in the world, rests on the values on the basis of which the Council of Europe has developed its action. I would say simply, like you and after you: the freedoms, all the freedoms; human rights, all human rights.<sup>206</sup>

Speaking again at the Parliamentary Assembly just three years later, Mitterrand asked, "Will Europe, bruised by so many fratricidal wars, find fresh grounds for hope in this reference, which we have enshrined in the very Statute of your Organisation, to the spiritual and moral values that are the common heritage of these peoples and underpin the primacy of law on which all true democracy is founded?"<sup>207</sup>

Between those two speeches, three countries in Eastern Europe (Hungary, the Czech and Slovak Federal Republic, and Poland) had been admitted to the Council of Europe as new members; a fourth, Bulgaria, was added three days after the second speech. Although Mitterrand gently criticized the organization itself (noting the increasing backlog of cases before the Commission and the Court), he made no mention at all of the difficulties or risks were presented in admitting new members whose experience of those values he lauded had been quite different, if experienced at all.

Those were heady days, when the world seemed to have been given a second chance. A little generosity of spirit (a margin of appreciation) should be accorded the decision-makers and political leaders of that time. They acted with no historical script to guide them. Looking back, however, the risks they were taking seem clearer and, perhaps, are easier to see now in light of subsequent events.

By definition, values are not created by fiat, nor are they susceptible to being quickly changed. Values change slowly, opening the way for a leader who does not share them to undo the work of reformist predecessors. Reforms lack their own sticking power. Quickly created formal institutions, constitutions, and laws rely for their lasting effect on informal norms, traditions, and accepted

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<sup>206</sup> François Mitterrand, Speech to the Parliamentary Assembly of the Council of Europe (May 5, 1989).

<sup>207</sup> François Mitterrand, Speech to the Parliamentary Assembly of the Council of Europe (May 4, 1992).

ways of conducting government and civil society that are slow to accrete and require time to strengthen.

From the point of view of an international organization like the Council of Europe, eager to help develop both the formal and informal institutions that might someday cohere into a “common heritage of political traditions, ideals, freedom and the rule of law,”<sup>208</sup> the old Russian question was devilishly difficult: *Что делать?* What is to be done? Fearing a closing window of opportunity to assist what were at the time hopefully called emerging democracies, and eager for the institutional prestige the Council could gain in doing so, the Council of Europe concluded that its values were best preserved by weakening their use as legal requirements for membership. “Russia does not yet meet all Council of Europe standards. However, integration is better than isolation; co-operation is better than confrontation.”<sup>209</sup>

It might be said that law did not determine that result. But it cannot be said that law did not influence the outcome. Abram Chayes recounts a similar lesson. He rejected accounts of international law as irrelevant where the highest echelons of decision-makers did their work, something that served as nothing more than window dressing for a policy reached on other grounds: “The words evoke the familiar image of the devious, fork-tongued lawyer, who can and usually does make the worse appear the better cause.”<sup>210</sup>

The power of law, especially as a vehicle to encapsulate the values of this international organization, was to force decision-makers to reckon with those values in a meaningful way. This matters, even if the law is interpreted in a way that is contestable. It channels decision-making. Chayes’s experience led him to a nuanced view of the role of law in institutional decision-making processes:

[T]here are many who still consider that legal advice or criticism in the international field consists in laying the norm invoked beside the challenged decision and seeing whether the latter squares with the former.

International law, in its normative sense, must be seen as indeterminate with respect to much of the array of concrete choices open in a particular situation. Often the rules have no authoritative formulation in words. Even when they do, the terms are open to a broad range of interpretation and emphasis. They do not dictate conduct so much as orient deliberation, order priorities, guide within broad limits. Moreover, institutional structures that are the product of law can be as important as rules, and more so in organizing and channeling decision.<sup>211</sup>

The argument of this paper has been that the values of the Convention gained meaningful force in the decision to admit Russia to membership through similarly stated legal requirements in the Statute of the Council of Europe. As

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<sup>208</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 10, at Preamble.

<sup>209</sup> EUR. PARL. ASS., *Report on Russia’s Request*, *supra* note 121.

<sup>210</sup> CHAYES, *supra* note 1, at 41.

<sup>211</sup> *Id.* at 101–02.

with other countries of the former Warsaw Pact, those requirements were sometimes read in ways that lessened their ultimate effect as criteria for membership in service to the goal of facilitating future reform through the process of seeking (and maintaining) membership.

Not everyone agreed with this interpretation of the Statute. And analysis of the effect Russia's membership had both in Russia and on the institutions of the Council themselves—most significantly the European Court of Human Rights—can shed light on whether those choices to admit Russia and other countries in that wave of expansion were the right ones. But it was law that constrained decision-makers to reckon with those values in methodical procedures that in turn shaped how those values would be translated into concrete commitments, *i.e.* action.

Or, to put the point into more quotidian terms, as Chayes did: “[E]ven if conduct violates a relatively determinate legal standard, it does not necessarily follow that the action was unaffected by the law. Do we believe that the behaviour of a man travelling 65 miles an hour on a super-highway with a 60-mile speed-limit was not constrained by law?”<sup>212</sup>




It is another question entirely whether that super-highway, though paved with good intentions, leads to a bad end. (That is the next article.)

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<sup>212</sup> *Id.* at 26.

## APPENDIX

A Timeline of Key Events, 1989-1999<sup>213</sup>

Secretary General Council of Europe	Soviet/Russian Leader	Date	Event
Catherine Lalumière, 1 June 1989 – 31 May 1994 	Mikhail Gorbachev 11 Mar. 1985 – 25 Dec. 1991 	5 May 1989	Finland joins CoE
		5 May 1989	PACE speech of François Mitterrand
		6 July 1989	PACE speech of Mikhail Gorbachev
		9 Nov. 1989	Fall of the Berlin Wall
		6 Nov. 1990	Hungary joins CoE
		13 Jan. 1991	Soviet troops kill 14 in Vilnius
		21 Feb. 1991	Czech & Slovak Fed. Rep. joins CoE
		22 Aug. 1991	Attempted Soviet coup d'état fails
		26 Nov. 1991	Poland joins CoE
		25 Dec. 1991	Soviet Union ceases to exist
	Boris Yeltsin 25 Dec. 1991 – 31 Dec. 1999 	7 Feb. 1992	Treaty of Maastricht
		4 May 1992	PACE speech of François Mitterrand
		6 May 1992	Russia requests to join CoE
		7 May 1992	Bulgaria joins CoE
		25 June 1992	CM Resolution on Russian invitation
		10-11 Sept. 1992	Special Meeting of the CM, Istanbul
		11 Sept. 1992	Croatia requests to join CoE
		14 May 1993	Estonia joins CoE
		14 May 1993	Lithuania joins CoE
		14 May 1993	Slovenia joins CoE
		30 June 1993	Czech Republic (re)joins CoE
		30 June 1993	Slovak Republic (re)joins CoE
		4 Oct. 1993	Shelling of Russian White House
		7 Oct. 1993	Romania joins CoE
		8 Oct. 1993	Vienna Summit
10 Nov. 1994	Andorra joins CoE		
11 Dec. 1994	Chechen War air/land assault begins		
10 Feb. 1995	Latvia joins CoE		
13 July 1995	Albania joins CoE		
13 July 1995	Moldova joins CoE		
9 Nov. 1995	North Macedonia joins CoE		
9 Nov. 1995	Ukraine joins CoE		
28 Feb. 1996	Russia joins CoE		
6 Nov. 1996	Croatia joins CoE		
5 May 1998	Russia ratifies ECHR		
27 April 1999	Georgia joins CoE		
31 Dec. 1999	Yeltsin resigns; Putin, Acting Pres. RF		

<sup>213</sup> Andrew Drzemczewski, *Ensuring compatibility of domestic law with the European Convention on Human Rights prior to ratification: The Hungarian model/ Introduction to a reference document*, 16 HUM. RTS. L. J. 241, 247 (1995); SG/INF (94) 12, Present State of Relations with the Russian Federation, Secretariat Information Paper prepared by the Directorate of Political Affairs, May 6, 1994; <https://www.coe.int/en/web/about-us/our-member-states?desktop=true> [https://perma.cc/FF6W-PK8K].