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**THE DISAPPEARANCE OF RAOUL WALLENBERO: A RESOLUTION  
IS POSSIBLE (CRIME AND PUNISHMENT: ACCOUNTABILITY FOR  
STATE-SPONSORED MASS MURDER)**

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## THE DISAPPEARANCE OF RAOUL WALLENBERG: A RESOLUTION IS POSSIBLE

*Therefore but a single man was created in the world, to teach that if any man has caused a single soul to perish from Israel Scripture imputes it to him as though he had caused a whole world to perish; and if any man saves alive a single soul from Israel Scripture imputes it to him as though he had saved alive a whole world.<sup>1</sup>*

### I. INTRODUCTION

Raoul Wallenberg is a hero of whom the world took notice when he saved nearly 100,000 Hungarian Jews from the Nazis in 1944. Raoul Wallenberg saved more Jews in the Second World War than did any single government.<sup>2</sup> The Soviet Union arrested Wallenberg in 1945 for no stated reason, and he disappeared.

This Note contends that under Soviet and international law, Wallenberg's arrest and continued detention are illegal, and the Soviet Union is obligated to accept responsibility for Wallenberg's disappearance. This Note further examines the disappearance of Wallenberg in the context of Soviet Marxist ideology and recent changes in the Soviet perception of international and Soviet domestic law.

Once the Soviet Union is willing to accept responsibility for Wallenberg's disappearance, show a readiness to obey its own domestic laws and observe the international treaties to which it is a party, the Wallenberg case can be resolved. This Note analyzes specific provisions of Soviet and international law, especially as they relate to diplomats, and asserts that as a Swedish diplomat, Raoul Wallenberg was entitled to the protection of the Vienna Convention on Diplomatic Relations upon its enactment in 1961.<sup>3</sup> He also was entitled to the protection of the Soviet Union's Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR.<sup>4</sup>

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1. *Mishnah Nezikin, Tractate Sanhedrin* § 4, para. 5, in THE MISHNAH 388 (H. Danby trans. 1933).

2. *Biography of Raoul Wallenberg*, in I. COTLER, SUMMARY OF REPORT OF INTERNATIONAL COMMISSION OF INQUIRY RE FATE AND WHEREABOUTS OF RAOUL WALLENBERG 1947-1990 app. A, at 1 (1990).

3. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502 [hereinafter Vienna Convention].

4. Enacted in 1966, this Soviet statute provides diplomats in the USSR immunity from arrest or detention. Statute on Diplomatic and Consular Representations of Foreign States

Finally, this Note examines the work of an international commission investigating the whereabouts of Raoul Wallenberg and presents an acceptable solution to the Wallenberg mystery that can and should be initiated by the Soviet Union.

## II. THE WALLENBERG CASE

### A. *The Background*

Raoul Wallenberg arrived in Hungary in July of 1944 on a mission to save as many of the remaining Jews of Budapest as possible from extermination in the Nazi death camps.<sup>5</sup> Wallenberg came from a family of wealthy bankers in Sweden, which took a neutral stand during World War II.<sup>6</sup> In late 1939, Wallenberg became involved in Finnish War Relief when the Soviet Union invaded Finland.<sup>7</sup> In the early 1940s, Wallenberg worked for a Hungarian Jewish businessman who owned an export-import business in Stockholm.<sup>8</sup> Due to the growing anti-Jewish sentiment in Europe, Wallenberg did most of the business travelling for his boss.<sup>9</sup> In early February 1942, Wallenberg travelled to Budapest for several weeks, where he learned more about Nazi anti-Semitism in Eastern Europe characterized by mass murders and anti-Jewish legislation, all the while witnessing the false sense of security and optimism of Budapest businessmen.<sup>10</sup>

Iver Olsen, the American War Refugee Board representative in

on the Territory of the USSR, May 23, 1966, *translated and reprinted in* III SOVIET STATUTES AND DECISIONS: A JOURNAL OF TRANSLATIONS 40 (1967) [hereinafter SOVIET STATUTES].

5. Adachi, *The Power of One*, in *RAOUL WALLENBERG IN PERSPECTIVE* 5 (K. Reiser & T. Neumann eds. 1986); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985). See generally E. LESTER, *WALLENBERG: THE MAN IN THE IRON WEB* (1982). During the years 1942 to 1944, when millions of Jews from Germany, Poland, Latvia, Czechoslovakia and Rumania were taken to the gas chambers and killed by the Nazis, few countries cared. *Id.* In 1944, Hungarian Jews faced extermination, but Wallenberg volunteered to rescue them. Adachi, *supra*, at 5.

6. See generally E. LESTER, *supra* note 5; K. MARTON, *WALLENBERG* (1981) (presenting a history of the Wallenberg family and Raoul's upbringing, and a description of Sweden's politics during World War II).

7. E. LESTER, *supra* note 5, at 52-53. Wallenberg served in Sweden's "Home Guard" and on weekends led his company on maneuvers in the countryside outside of Stockholm. *Id.*

8. *Id.* at 54-55; see also Adachi, *supra* note 5, at 5.

9. E. LESTER, *supra* note 5, at 54-55.

10. *Id.*

Stockholm, had been looking for a Swede to travel to Hungary on a diplomatic mission to save the remaining Jews from the Nazis.<sup>11</sup> Wallenberg's boss recommended Raoul.<sup>12</sup> Sweden granted Wallenberg full diplomatic status<sup>13</sup> and the United States funded his mission under the auspices of the American War Refugee Board.<sup>14</sup> Before Wallenberg's arrival in Hungary, the Nazis already had killed 430,000 Jews in the countryside.<sup>15</sup> Two hundred-thirty thousand Jews were still living in Budapest.<sup>16</sup>

At the onset of World War II, Hungary became a supporter of the Axis and, in late 1944, the Arrow Cross (Hungarian Nazi) Party was formed to help fight the Soviets.<sup>17</sup> During the war years, the Hungarian Jews were a constant target of looting, kidnapping and killing.<sup>18</sup> The Jews of Budapest were forced into a central ghetto which, according to Raoul Wallenberg, held well over 69,000 people.<sup>19</sup> Under the command of SS Lieutenant Colonel Adolf Eichmann, Budapest Jews were deported in groups to forced labor camps and to the Nazi death camp at Auschwitz.<sup>20</sup>

Within six months of his arrival in Budapest, Raoul Wallenberg saved the lives of nearly 100,000 Jewish people, by pulling them out of the

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11. Iver C. Olsen was a Treasury Department functionary with connections to the United States Office of Strategic Services, the wartime predecessor of the CIA. *Id.* at 61-62. The War Refugee Board sent Olsen to Stockholm to "stir some action" and be an official representative of neutral Sweden to Budapest to intervene for the Jews. *Id.*

12. *Id.* at 62.

13. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985); Adachi, *supra* note 5, at 5.

14. *See* Adachi, *supra* note 5, at 5; *see also* *Von Dardel*, 623 F. Supp. at 248-49. The United States alone could not intercede to save the Hungarian Jews from extermination because she was at war with Hungary, and American diplomatic presence there had been withdrawn. *Id.* at 248. Thus, the United States sought the assistance of Sweden, a neutral nation. *Id.* Wallenberg agreed to join the Swedish Legation in Budapest, as second secretary, assist the efforts of Sweden and "to act at the behest of the United States." *Id.* at 248-49.

15. Adachi, *supra* note 5, at 5.

16. *Id.*

17. *See generally* E. LESTER, *supra* note 5 (describing Hungary's involvement with the Nazis in World War II).

18. *Id.* Raoul Wallenberg, in one of his written reports on the situation in Budapest, described how Arrow Cross members kidnapped and tortured many Jewish people before passing them on for deportation. Wallenberg, *A Report on the Situation*, in *RAOUL WALLENBERG IN PERSPECTIVE*, *supra* note 5, at 3.

19. *Id.*

20. *Id.*; E. LESTER, *supra* note 5, at 67-68.

death marches on the way to concentration camps, and giving them Swedish protective passports;<sup>21</sup> by keeping them in "safe houses" which he declared were Swedish property;<sup>22</sup> and by working with representatives of neutral countries which had embassies in Hungary.<sup>23</sup> When the Nazis threatened to blow up the Budapest Jewish ghetto along with all its inhabitants, Wallenberg confronted Nazi leaders, specifically Lieutenant Colonel Eichmann, and personally threatened to have them hanged as war criminals if they proceeded with their plan.<sup>24</sup> They relented, and

21. This document, the *Schutzpass*, bore the Swedish three-crowns emblem, colored in blue and yellow, and carried a picture of the bearer. E. LESTER, *supra* note 5, at 87. The passport identified the bearer as a provisional Swede, who was emigrating to Sweden and was therefore under Swedish protection. *Id.* It was signed by the Swedish ambassador to Hungary and by Wallenberg. *Id.* In fact, Wallenberg put up signs all over Budapest showing an enlarged picture of this protective passport. *Id.* The sign stated that people who had these passports could not be taken away because they were under the protection of the Swedish government. *Id.* The Nazis would not touch the people who possessed these passports. Adachi, *supra* note 5, at 6.

The Germans accepted the *Schutzpass* system until October 1944, when the Arrow Cross (Hungarian Nazi) government took power and began deporting the Budapest Jews. E. LESTER, *supra*, at 7. Wallenberg officially issued less than 5,000 *Schutzpass*, but unofficially issued about 20,000, so the Nazis had no way of knowing which were "authentic" and which were not. *Id.* at 7-8. This allowed more people to escape, since those who held these protective passports could not be deported. *Id.* Thus, the *Schutzpass* system saved at least 20,000 Jews. Y. Kaufman, Draft Petition on Behalf of Raoul Wallenberg to Procurator-General Rekunkov of the USSR 1 (1985) (unpublished working draft prepared under the aegis of the Working Group at Harvard Law School, headed by Ruti Teitel).

22. These houses were offered by anti-Nazi Christians and rich Jews from Budapest. Adachi, *supra* note 5, at 6. Conspicuously marked with Swedish flags, the houses provided safety for each of about 700 to 800 people and supplied water, food and latrines. *Id.* at 6. Wallenberg protected about 13,000 Jews in these safe houses. Y. Kaufman, *supra* note 21, at 1.

23. He thus saved approximately 70,000 Jewish people. Y. Kaufman, *supra* note 21, at 1.

24. Jewish urban populations in Eastern Europe during World War II were concentrated in either closed-off sections or entire cities and towns called "ghettos," which were set up to facilitate deportation to the concentration camps and gas chambers. P. ANGER, WITH RAOUL WALLEMBERG IN BUDAPEST 39 (1981). In a memo to German Army headquarters, Wallenberg described life in the Budapest ghetto:

Some 53,000 persons inhabit the Budapest ghetto. . . . of these, several thousand suffer from under-nourishment and are lying in the tenement houses used as hospitals. . . . The Ghetto is not heated. Originally, the area now serving as a ghetto was inhabited by 15,000 people, and under these conditions the Jews are living at a scale worse than any Hungarian refugee. . . . they have no soap and very little water and but a few candles. . . . the death rate in the ghetto is higher than anywhere else in the capital. . . . the authorities of the capital have made

Wallenberg thus saved many more lives.<sup>25</sup>

### B. The Disappearance

The Soviet army occupied Budapest in mid-January 1945.<sup>26</sup> On January 17, Raoul Wallenberg left 16 Benczur Street<sup>27</sup> with his driver, Wilmos Langfelder,<sup>28</sup> to go to Debrecen<sup>29</sup> to see the Soviet commander, Marshal Rodion Malinovsky, and the heads of the newly-established Hungarian Provisional Government.<sup>30</sup> He sought to discuss with the Soviet commander his plan for the relief and rehabilitation of Budapest.<sup>31</sup> Wallenberg obtained the appropriate travel permit, and Major Dimitri Demchinkov and a two-motorcycle escort accompanied Wallenberg.<sup>32</sup> Upon seeing this motorcade, Wallenberg commented to a colleague,<sup>33</sup> "I

a food allotment of 900 calories per head a day. . . . [m]embers of the Armed Forces receive 3,600 calories per man per day and the lowest ration in prisons amounts to 1,500 calories.

K. MARTON, *supra* note 6, at 140. For humane reasons this plan must be described as utterly crazy and inhuman. *Id.* at 141.

25. See Von Dardel v. USSR, 623 F. Supp. 246, 249 (D.D.C. 1985) (quoting S. REP. NO. 169, 97th Cong., 1st Sess. 2 (1981)).

26. See generally J. BIEMAN, *RIGHTEOUS GENTILE: THE STORY OF RAOUL WALLENBERG, MISSING HERO OF THE HOLOCAUST* (1981); E. LESTER, *supra* note 5. The Soviets invaded Nazi controlled countries in Eastern Europe to "liberate" them; Hungary had been Hitler's last ally. K. MARTON, *supra* note 6, at 150-51. Hundreds of German soldiers turned to the Hungarian people to provide them with civilian clothing in order to escape the Soviet invasion of Budapest. *Id.* at 150.

27. This was a Red Cross building that Wallenberg was using as one base of operations. E. LESTER, *supra* note 5, at 8, 10. Wallenberg's "headquarters" was located at Ulloi Avenue No. 2; he also utilized the Swedish Legation across a bridge from his headquarters. P. ANGER, *supra* note 24, at 189.

28. Langfelder was an engineer who came from a distinguished Budapest family. E. LESTER, *supra* note 5, at 10. A fellow prisoner reported seeing Langfelder and Wallenberg in prison together in Moscow in February 1945, but a relative of Langfelder claims no knowledge of the sighting. *Id.* at 160-61. There are no further reports about sightings of Langfelder after that date. *Id.*

29. Debrecen is located about 130 miles northeast of Budapest. *Id.* at 10.

30. *Id.*

31. *Id.* Wallenberg's project arranged the search for lost members of families, help with housing, collection and distribution of furniture, help with emigration and repatriation, aid to Jews to revive businesses taken from them, care for orphans, and setting up temporary hospitals. *Id.* at 10-11.

32. Permission was granted by Zuglo District Commander General Tchemishev. Y. Kaufman, *supra* note 21, at 1.

33. This colleague was George Wilhelm, who organized the Red Cross house on

don't know whether it is to protect me or if I am under arrest."<sup>34</sup> That was the last time Wallenberg was seen by his friends and colleagues in Budapest.<sup>35</sup> En route to Malinovsky's headquarters,<sup>36</sup> Wallenberg and Langfelder were arrested by the NKVD.<sup>37</sup> Witnesses reported that the two men were transported by a train through Hungary, Romania and into the Soviet Union where they were put into separate cells in Moscow's Lubianka prison.<sup>38</sup>

On January 16, the day before Wallenberg began his journey, the Swedish ambassador in Moscow received a letter from Soviet deputy foreign minister Vladimir Dekanosov, stating that Wallenberg was in Soviet hands.<sup>39</sup> The note said: "the Russian military authorities have taken measures to protect Raoul Wallenberg and his belongings."<sup>40</sup>

Benczur Street. E. LESTER, *supra* note 5, at 10.

34. *Id.* at 10; *see also* Adachi, *supra* note 5, at 8.

35. E. LESTER, *supra* note 5, at 11.

36. *Id.* Reports vary on the exact time when Wallenberg and Langfelder were arrested. *Id. Compare id.* at 12-13 (asserting that Wallenberg and Langfelder drove a short distance to the outskirts of Budapest when they were turned back and taken to NKVD headquarters) with J. BIERMAN, *supra* note 26, at 123 (asserting that the exact time of Wallenberg and Langfelder's arrest is unknown).

37. *Id.* The People's Commissariat of Internal Affairs (NKVD) were the Russian security police, predecessors of the Committee on States Security (KGB). E. LESTER, *supra* note 5, at 9.

From 1934-41, the state security agencies operated as the Chief States Security Administration of All-Union and Union Republic People's Commissariats of Internal Affairs—the NKVD. W. BUTLER, *SOVIET LAW* 133 (2d ed. 1988). In 1941, on the eve of Soviet involvement in World War II, the NKGB was formed as the USSR People's Commissariat of State Security. *Id.* at 134. Later in 1941, the NKGB merged with the NKVD, and the agencies separated 10 years later. *Id.* In 1978, the agency was renamed the Committee of State Security of the USSR (KGB). *Id.* In general, the KGB's function is to perform preliminary investigations for certain crimes against the state and for military crimes. *Id.* at 135.

38. According to one report, they were not treated badly. The report states that they were taken on a tour of the city and shown the Moscow subway before being brought to the Lubianka prison. E. LESTER, *supra* note 5, at 13.

Avraham Shifrin, a Soviet Jew, tells of the horrors of Soviet prison life and the violations by the Soviets of Human Rights Declarations and Soviet law. *See generally* THE INTERNATIONAL SAKHAROV HEARING 44 (M. Harasowska & O. Olhovyeh eds. 1977). Shifrin served in the Soviet army and then was arrested in 1953 on charges of "Israeli-American espionage." *Id.* He spent 10 years in Soviet prisons, including the Lubianka, and four years in exile. *Id.* Specifically, he tells of detention without an arrest warrant, brutal searches, interrogations and isolation from family and legal assistance while in the Lubianka. *Id.* at 46-47.

39. E. LESTER, *supra* note 5, at 13.

40. J. BIERMAN, *supra* note 26, at 123-24; *see also* E. LESTER, *supra* note 5, at 13.

Accordingly, the Swedish authorities were under the impression that Wallenberg was being held in protective custody and did not worry.<sup>41</sup> After several weeks passed with no news from him, his mother, Maj von Dardel, asked for assistance from Mme. Alexandra Kollontay, the Soviet ambassador to Sweden.<sup>42</sup> Mme. Kollontay told von Dardel that Wallenberg was safe in Moscow and would soon be back home in Sweden.<sup>43</sup> She also told the Swedish Foreign Minister's wife that it would be best if no "fuss" were made about the matter, and that Wallenberg was in custody because he had done some "dumb" things in Budapest.<sup>44</sup>

A number of theories purport to explain why the Soviets arrested Wallenberg. It has been thought that the Soviets suspected he was an American agent whose large-scale rescue operation was a cover for espionage activities and links to the CIA.<sup>45</sup> The Soviets were also

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41. E. LESTER, *supra* note 5, at 13.

42. *Id.*

43. *Id.*

44. Ingrid Gunther was the wife of Swedish Foreign Minister Christian Gunther and was invited to tea with Mme. Kollontay. *Id.* One of the "dumb" things Mme. Kollontay referred to was Wallenberg's plan to rehabilitate Budapest, which included restoring economic life to the city. *Id.* at 19. This meant returning to the Jews their lost property and businesses. *Id.* His plan involved establishing an autonomous agency in a Russian-controlled area. *Id.*

45. Fein, *Soviets Show Wallenberg's Jail Card*, N.Y. Times, Oct. 21, 1989, at A3, col. 4. That Wallenberg held more than \$1,000 in United States currency when he was seized may have reinforced Russian suspicions that he was a spy. *Wallenberg Rejected Refuge, Friend Says*, Seattle Times, Jan. 15, 1990, at A3, col. 2.

The Soviets may have believed Wallenberg was involved in more extensive activities than a mere rescue operation. E. LESTER, *supra* note 5, at 18. Laszlo Hertelendy, now in his eighties, was a Hungarian nobleman who assisted Wallenberg in his rescue mission. *Id.* Hertelendy recently broke his silence "to put the record straight" and declared that Wallenberg was a double-agent working for American and German intelligence. Ronay, *Wallenberg 'Was Double Agent,'* The Times (London), Mar. 20, 1990, at 10, col. 7. Hertelendy told Budapest Radio that Wallenberg's initial plan was to save some 400 to 500 Jews "with family or business links to Sweden," but he decided early on to save as many Jews as he could from the Nazis. *Id.* The Hungarian claimed Wallenberg also worked for German intelligence. *Id.* "In exchange for (American) information," he said, Wallenberg was allowed, with Eichmann's knowledge, to save the lives of Jews in a "kind of *quid pro quo*." *Id.* He managed to save up to 20,000 lives by keeping up this "double-act." *Id.*

The Soviets discovered either from Wallenberg's personal papers or colleagues that his rescue mission had been instigated by the American War Refugee Board. E. LESTER, *supra*, at 19. Iver C. Olsen, who represented the War Refugee Board in Stockholm, chose Wallenberg for the mission. *Id.* at 20. Olsen is said to have had connections with the Office of Strategic Services (the predecessor of the CIA). *Id.* While Wallenberg may have been unaware of Olsen's connections, the Soviets probably viewed Wallenberg as an American agent using Swedish diplomatic papers and a humanitarian mission as a cover for



suspicious of the large amounts of money that the American Jewish Joint Distribution Committee<sup>46</sup> and Hungarian Jews had given Wallenberg.<sup>47</sup> Wallenberg probably had no idea how sinister this combination of American and Jewish money seemed to the Soviets.<sup>48</sup>

Wallenberg met regularly with top German and Hungarian Nazis in the course of his work.<sup>49</sup> "Consorting with the enemy" was a standard accusation made by the NKVD against individuals or groups whom it sought to arrest.<sup>50</sup> Finally, the Wallenberg family was one of Sweden's wealthiest and most illustrious families.<sup>51</sup> The Soviets may have found it very odd that a leading Swedish capitalist was in Budapest during a massacre, risking his life to save a handful of Hungarian Jews.<sup>52</sup>

The Soviets never explained why they took Wallenberg into custody.<sup>53</sup> For years, there were rumors that the Nazis killed Wallenberg outside Budapest<sup>54</sup> or that he was living in disguise in Buda<sup>55</sup> or Switzerland or even Istanbul.<sup>56</sup>

### C. *The Soviet Response*

The Soviets have given three official, although contradictory, replies to inquiries into Wallenberg's whereabouts. First is a 1945 note, signed by Dekanosov, which says that Soviet troops did indeed take Wallenberg into custody in Budapest.<sup>57</sup> The "Vyshinsky note"<sup>58</sup> which came two

establishing an American presence in Hungary. *Id.*; see also *supra* note 11 and accompanying text.

46. This agency was designed to aid needy Jewish communities throughout the world. E. LESTER, *supra* note 5, at 20.

47. The Nazis did not allow Hungarian Jews to hold money or valuables beyond the barest stipend. *Id.* at 20.

48. *Id.* at 18-20.

49. *Id.* at 20.

50. *Id.*

51. The Wallenbergs were leading Swedish bankers who negotiated all Sweden's trade dealings with both the Allies and the Axis during the war. *Id.* at 20-21.

52. *Id.* at 21.

53. *Id.* at 14.

54. See Korey, *An Obligation to Learn the Truth*, Chi. Tribune, Jan. 9, 1990, at 13, col. 2; E. LESTER, *supra* note 5, at 14.

55. Budapest is made up of two smaller cities, Buda and Pest. Buda is in the hills, Pest is on the plains, and the Danube flows between. Adachi, *supra* note 5, at 6.

56. E. LESTER, *supra* note 5, at 14.

57. This was the response given to the Swedes. It stated, "Russian military authorities have taken measures to protect Raoul Wallenberg and his belongings." Korey, *supra* note

years later, claimed: "Wallenberg is not in the Soviet Union and is unknown to us."<sup>59</sup> The third reply, in 1957 from then Deputy Foreign Minister Andrei Gromyko, stated that a new investigation had revealed that Wallenberg was a Soviet prisoner until July 17, 1947, when he "died suddenly" of a heart attack.<sup>60</sup> If this last account were true, Wallenberg would have died of a heart attack at the unlikely age of thirty-five.<sup>61</sup> The import of the Gromyko message was that Wallenberg had been a victim of Stalinist excesses and the Wallenberg case was closed.<sup>62</sup>

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54, at 13, col. 2. The note halted further inquiry for a time. E. LESTER, *supra* note 5, at 13.

58. Teitel, *The Disappearance of Raoul Wallenberg: A Lawyer's Perspective*, in *RAOUL WALLENBERG IN PERSPECTIVE*, *supra* note 5, at 16. Andrei Vyshinsky was the deputy foreign minister at the time. Korey, *supra* note 54, at 13, col. 2.

59. Teitel, *supra* note 58, at 16. The document stated that Wallenberg had never been in Soviet territory and that the Soviets had had nothing to do with him. *Historians Discuss Fate of Sweden's Wallenberg*, Moscow Television Service, Aug. 26, 1989, translated in Foreign Broadcast Information Service [FBIS-SOV] 89-165, Aug. 28, 1989, at 3 [hereinafter *Historians Discuss Wallenberg*].

60. This report was issued after an investigation instigated by a visit to the Soviet Union by the Swedish prime minister sometime prior to 1957 and on Khrushchev's initiative. *Historians Discuss Wallenberg*, *supra* note 59, at 3. In this reply, the Soviets claimed they "found" a 1947 medical report presumably written by the Lubyanka prison medical chief, Col. A.L. Smoltsov, and sent to the minister of state security, Viktor Abakumov. Korey, *supra* note 54, at 13, col. 2. The medical report stated that a prisoner named "Walenberg" [sic] had died of a probable heart attack. E. LESTER, *supra* note 5, at 14. Coincidentally, Smoltsov had died in 1953, Abakumov was executed in 1952 for anti-state crimes, and Abakumov's chief, Beria, Stalin's head of security, had also been shot for "criminal activities." *Id.*; Korey, *supra*. Neither the report itself nor a photocopy of it were made public. Korey, *supra*.

61. Wallenberg was born on August 4, 1912. E. LESTER, *supra* note 5, at 30.

62. *Id.* at 14. In an odd twist to the Wallenberg mystery, a Hungarian magazine recently published an article charging that Wallenberg was killed by Soviet troops in Hungary in February 1945. Fein, *supra* note 45, at A3, col. 4. The magazine, *Pont*, a Defense Ministry journal, tells of two brothers named Molnar who say their father, now dead, saw two Soviets kill Wallenberg and Langfelder in Hungary on February 2, 1945. *Id.* The brothers say they themselves dug the graves about one month later. *Id.*

Yet another account of the Wallenberg disappearance has been presented by the Hungarian "Wallenberg Association" which claims that Wallenberg "was killed in the early fifties when the campaign to combat 'cosmopolitanism' began in the Soviet Union and other socialist countries." *NKVD Archive Said Key to Wallenberg Mystery*, Moscow Komsomolskaya Pravda, July 11, 1989, at 3, translated in Foreign Broadcast Information Service [FBIS-SOV] 89-139, July 21, 1989, at 16. The group believes it probable that the Soviets suspected Wallenberg of spying for Germany. *Id.*

Recently, a former KGB official claimed that he saw the Wallenberg file in the security agency's archives indicating that Wallenberg was executed "not later than 1947" after he refused to be recruited by the Soviet Red Army in 1945. *Wallenberg Reported*

### D. *The Sightings of Wallenberg*

The Wallenberg case never has been satisfactorily resolved.<sup>63</sup> Over the years, many former prisoners and various scientists and officials have reported seeing or being in contact with Wallenberg in various Soviet prisons. As of 1957, eighteen former prisoners who left the Soviet Union reported direct contacts with Wallenberg and Langfelder.<sup>64</sup> The most notable of these later sightings of Wallenberg include one by ex-fellow prisoner Abraham Kalinski who, upon emigrating to Israel in 1976, reported that he had met Wallenberg in the Vladimir prison, located roughly 100 miles east of Moscow, in 1959.<sup>65</sup>

In 1977, a former Soviet Jewish prisoner, Jan Kaplan, recalled,<sup>66</sup> "When I was in the prison infirmary in Butyrka in 1975 I met a Swede who'd been in different prisons for thirty years and he was in pretty good condition."<sup>67</sup> When Kaplan later tried to smuggle out a letter he had

*Shot in '47*, N.Y. Times, Oct. 18, 1990, at A14, col. 1.

63. Wallenberg's family members as well as a number of organizations which have been formed to discern the truth about Wallenberg's disappearance believe Wallenberg may still be alive and continue to press the Soviet Union for information. See Fein, *supra* note 45, at A3, col. 4.

64. In 1957, the Royal Swedish Foreign Office published a set of documents about the Wallenberg case up to that date. E. LESTER, *supra* note 5, at 164.

65. K. MARTON, *supra* note 6, at 176, 195-96. In 1961, Soviet physician Alexander Miasnikov, the director of several Soviet hospitals and Khrushchev's private physician, indicated to Swedish physician Nanna Svartz, that Wallenberg was alive but "in very poor condition" and was being held in a mental hospital. *Id.* at 153. Dr. Svartz, an internationally renowned Swedish internist, as well as Wallenberg's mother's physician, attended a scientific conference in Moscow where she met with Miasnikov and asked him if he knew anything about the Wallenberg case. *Id.*

Professor Svartz was advised to contact the Soviet foreign minister; her attempts, however, were fruitless. GOVERNMENT WHITE PAPER ON WALLEMBERG AFFAIR, DEPARTMENT OF STATE AIRGRAM FROM AMEMBASSY STOCKHOLM (Oct. 4, 1965), at 3, encl. 1 to A-222. She even had the support of a letter from Swedish prime minister Erlander to Soviet president Khrushchev requesting that a Swedish physician be allowed to travel to Moscow to consult with Soviet physicians on transporting Wallenberg back to Sweden. *Id.* at 3-4. There was no reply to the letter and a personal phone call by Swedish ambassador Sohlman elicited an immediate and categorical declaration that there was no new information on the Wallenberg affair. *Id.* at 4.

During another visit to Moscow in 1961, Dr. Svartz again met with her informant, who suddenly maintained that Svartz had misunderstood him regarding Wallenberg. *Id.* He declared then that he knew nothing about Wallenberg. *Id.*

66. Jan Kaplan telephoned his daughter in Israel when he was released from prison in 1976. Teitel, *supra* note 58, at 17; see also E. LESTER, *supra* note 5, at 140-41.

67. E. LESTER, *supra* note 5, at 140.

written to his family about Wallenberg, he again was arrested.<sup>68</sup> A report in Sweden, in August 1988, claimed that Wallenberg had been seen in December 1986 at a Soviet prison hospital near the Chinese border.<sup>69</sup> Yet another recent report claims that Wallenberg was alive in the Soviet Union in 1988.<sup>70</sup> As the only official word on Wallenberg is the Lubianka prison doctor's report, it is almost impossible to discern whether any of the reported sightings of Wallenberg are actual or fictitious.

The Soviet response to these sightings has been cool. Perhaps not surprisingly, the Soviets dismiss the witnesses' reports as "so vague, indirect and contradictory that they cannot elicit any serious conclusions."<sup>71</sup> The Soviets still maintain that Wallenberg died in 1947, and insist that the Wallenberg prison file cannot be found in the KGB archives.<sup>72</sup>

68. *Id.* at 140-41.

69. Korey, *Will Little Signs Add Up to a Real Soviet Thaw on the Wallenberg Case?*, L.A. Times, Feb. 27, 1989, pt. 2, at 5, col. 1. In late 1989, Leningrad biologist Alexander A. Smovsky stepped forward to recall that a man he believes was Wallenberg was alive at least two years after the Soviets claimed he died. Hamilton, *At Long Last, Some Clues to Wallenberg's Fate*, L.A. Times, Oct. 14, 1989, at A6, col. 1. Smovsky identified pictures of Wallenberg for the Raoul Wallenberg Association after he heard a Soviet broadcast asking anyone with information about Wallenberg to call a special number. *Id.* Smovsky was in prison camps from 1949 to 1955 for anti-Soviet activity. *Id.*

Smovsky recalled meeting Wallenberg twice in 1949 in the Krasnoyarsk transit camp in remote Eastern Siberia, where food was meager and the barracks icy cold. *Id.* Smovsky recalled "the Baron" (as other inmates referred to Wallenberg) as the Swedish prisoner who seldom spoke, seemed weary, had tattered clothes and was respected by other inmates. *Id.* Smovsky explained that because Wallenberg was a titled foreigner who seemed well-educated and calm in the face of the rigors of prison life, "everyone paid attention to him." *Id.* He also thought Wallenberg was ill and that something had happened to his legs because he never stood. *Id.*

70. This is claimed by Irwin Cotler, a Canadian law professor and human rights activist, who said he heard this report during a meeting in Moscow with Dr. Andrei Sakharov in February 1989. *Wallenberg 'Was Alive Last Year,'* Daily Telegraph (London), Mar. 28, 1989, at 8, 12. Professor Cotler then told an Israeli Wallenberg society that he had since received evidence from another unnamed source confirming the Sakharov account. *Id.*

71. *Officials Reaffirm Wallenberg Death in 1947*, Moscow TASS in English, Oct. 20, 1989, in Foreign Broadcast Information Service [FBIS-SOV] 89-204, Oct. 24, 1989, at 27. Nikolay Uspenskiy, a Soviet Foreign Ministry official made these remarks to reporters when Wallenberg's family members went to the Soviet Union in October 1989 to find out some details of Wallenberg's fate. *Id.* Uspenskiy said the KGB had questioned a number of witnesses whose names Wallenberg's family had provided and that all of the evidence is "indirect, vague and contradictory." *Id.*; see also Hamilton, *Soviets to Open Prison for Wallenberg Family*, L.A. Times, Oct. 21, 1989, at A8, col. 1; Charodeyev, *Is the Search for R. Wallenberg Continuing?*, *Izvestiya*, Oct. 21, 1989, at 5, excerpts reprinted in CURRENT DIG. SOVIET PRESS, Nov. 15, 1989, at 21.

72. Human rights activist and physicist Andrei Sakharov did not believe these official

### E. Recent Soviet Overtures Towards a Resolution

Recently, the Soviets have communicated with Wallenberg's family in Sweden and with organizations trying to locate either him or the truth surrounding his fate. In October 1989, the Soviets welcomed Wallenberg family members to the Soviet Union to tour the Lubyanka prison<sup>73</sup> and to give them some of Wallenberg's personal belongings that had been found in the prison archives.<sup>74</sup> Wallenberg's half-sister, Nina Lagergren,

assurances. *Sakharov Publicizes Wallenberg Prison Story*, Moscow News in English, Sept. 10, 1989, No. 37, at 6, in Foreign Broadcast Information Service [FBIS-SOV] 89-178, Sept. 15, 1989, at 24. He believed strongly that the file of a foreign diplomat, "which could some day become crucial for the reputation of this country and its leadership could not possibly be destroyed." *Id.* Sakharov believed that NKVD and KGB investigation files that are stamped "to be preserved forever" are never completely eradicated, although some pages may be removed upon instructions from high ranking party officials. Sakharov, *The Wallenberg Mystery*, TIME, May 21, 1990, at 58. Sakharov explained that the KGB always retains the first page of a file. *Id.* If a person has been executed, an affidavit that the death sentence had been carried out had to be included in the file, along with the serial number of the pistol used. *Id.* Complete files of cases involving foreigners almost always were preserved. *Id.* Sakharov felt the world should demand to see all documents pertaining to Wallenberg because the KGB probably has more information than it claims to have. *Sakharov Publicizes Wallenberg Prison Story*, *supra*, at 6.

Sakharov himself traveled to the Soviet Union to search for Wallenberg in two Soviet prisons, but came up with no trace of Wallenberg. See *Wallenberg Search Fails*, Wash. Post, Aug. 29, 1989, at A16, col. 6; *Wallenberg's Fate Baffles Sakharov, Too*, Chi. Tribune, Aug. 29, 1989, at 10, col. 1.

Ambassador Warren Zimmerman, the chief of the United States delegation to the 1988 Helsinki accord talks in Vienna, praised recent developments in the Soviet Union, noting that the notorious falsifications and cover-ups in history books are now being exposed and corrected. Korey, *supra* note 69, at 5, col. 1.

73. The Soviet representatives contacted Wallenberg's half-sister, Nina Lagergren, and half-brother, Guy von Dardel. Accompanying them on the trip was Sonja Sonnenfeld, the chairman of the Raoul Wallenberg Association, an organization formed to investigate Wallenberg's fate. See Hamilton, *Half-Brother to Pursue Wallenberg Leads*, L.A. Times, Oct. 26, 1989, at A9, col. 1; *Still Searching*, N.Y. Times, Oct. 22, 1989, § 4, at 7, col. 1.

74. The Soviets handed over Wallenberg's diplomatic passport, driver's license, some notebooks and a few other personal effects. See Charodeyev, *Once Again on the Fate of Raoul Wallenberg*, Izvestiya, Oct. 17, 1989, at 4, reprinted in CURRENT DIG. SOVIET PRESS, Nov. 15, 1989, at 21; Fein, *Soviets Give Kin Wallenberg Papers*, N.Y. Times, Oct. 17, 1989, at A10, col. 1. Nina Lagergren says these items "do not prove that Raoul is dead." *Id.*

The copy of the paper issued by Smoltsov of the Lubyanka Prison certifying Wallenberg's death in 1947 "shed no new light on the case," according to Wallenberg's relatives. Vukolov & Peskov, *Wallenberg Group Says Document 'Shed No New Light'*, Moscow TASS in English, Oct. 17, 1989, in Foreign Broadcast Information Service [FBIS-

believes this visit and the documents are a result of *glasnost*<sup>75</sup> and the new Soviet policy relating to human rights,<sup>76</sup> and sees this change as a big step forward for the future.<sup>77</sup> Consistent with this trend toward openness, in mid-1990, the Soviet Union agreed for the first time to open prisons and archives to an international commission investigating Wallenberg's fate.<sup>78</sup>

### III. SOVIET MARXIST IDEOLOGY WITH RESPECT TO LAW

Soviet ideology has evolved to a great extent since early Marxist anti-government ideology. A careful examination of this evolution from Marxism through the post-Stalin era will reveal why the Soviet Union is now likely to obey domestic laws and international treaties and make a substantial effort to disclose the true fate of Raoul Wallenberg.

Two famous Soviet lawyers of the 1920s, E.B. Pashukanis and P.I. Stuchka, said that Soviet law is not a body of legal rules, but rather that "[t]he body of norms, written or non-written, pertains by itself more to literary creation."<sup>79</sup> Pashukanis and Stuchka concluded that "[b]ourgeois laws just strive to pass over in silence the real character of this [capitalist] system, and that is why we shall point out once more that law . . . is not the laws."<sup>80</sup> The two lawyers shared the opinion that any law is bourgeois and will "die off."<sup>81</sup> This characterizes the concept of Soviet

SOV] 89-200, Oct. 18, 1989, at 38.

In addition to his belongings, Wallenberg family members were also given an index card on Wallenberg, filled in at the Lubyanka prison; judging by the entry, the card was brought there on February 6, 1945. *Wallenberg's Sister Praises Moscow Talks*, Moscow TASS in English, Oct. 22, 1989, in Foreign Broadcast Information Service [FBIS-SOV] 89-212, Nov. 3, 1989, at 35; see also Fein, *supra* note 45, at A3, col. 4. Soviet authorities say this card was discovered "by chance." *The Wallenberg Fog Persists*, N.Y. Times, Oct. 21, 1989, § 1, at 24, col. 2.

75. *Glasnost* means "openness." OXFORD RUSSIAN-ENGLISH DICTIONARY 130 (2d ed. 1984).

76. *Sister Interviewed on KGB Visit*, Moscow Television Service, Oct. 19, 1989, Solovyev Report from the "Vremya" newscast, translated in Foreign Broadcast Information Service [FBIS-SOV] 89-203, Aug. 23, 1989, at 34.

77. *Wallenberg's Sister Praises Moscow Talks*, *supra* note 74, at 35.

78. Keller, *Soviets Open Prisons and Records to Inquiry on Wallenberg's Fate*, N.Y. Times, Aug. 28, 1990, at A2, col. 3; see *infra* notes 270-76 and accompanying text.

79. O. IOFFE & P. MAGGS, *SOVIET LAW IN THEORY AND PRACTICE* 36 (1983). Stuchka was the chairman of the Russian Republic Supreme Court and Pashukanis was the director of the Institute of State and Law of the Academy of Sciences of the USSR. *Id.*

80. *Id.*

81. *Id.* Ironically, during Stalin's reign, Pashukanis and Stuchka were denounced as

legal realism.<sup>82</sup>

#### A. Karl Marx and V.I. Lenin

Marxist ideology centers around a belief that "a perfect society would not have a government but an administration."<sup>83</sup> Marx and many of the other revolutionaries and social theorists of the nineteenth century identified law and government with a coercive state and were convinced that society, not the state, was the key to future development.<sup>84</sup> Marx believed it to be fundamentally important for revolutionaries to seize state power and centralize government, to establish a dictatorship of the proletariat, to rule by decrees and to use legal and state power to change the economic and social order.<sup>85</sup> Marx's vision of the future was of a non-regulated or self-regulated society in which the state and the law as coercive instruments would no longer exist.<sup>86</sup>

Marxist ideology blossomed in the twentieth century. V.I. Lenin embraced the philosophy that since law cannot exist without the state, both the state and law would wither away simultaneously after the victory of socialism and a classless society, because socialism does not need law any more than it needs the state.<sup>87</sup> Lenin viewed the Communist Party as the

traitors who "liquidated law as a specific social category, drowned law in economics, [and] deprived it of its active, creative role." Tay & Kamenka, *Marxism, Socialism and the Theory of Law*, 23 COLUM. J. TRANSNAT'L L. 217, 241 (1985). Stuchka died in 1932; Pashukanis was arrested and executed in 1937. *Id.*

82. O. IOFFE & P. MAGGS, *supra* note 79, at 36. Stuchka defined law as a "system (or an order) of social relationships which corresponds to the interests of the dominant class and enforcement by the organized force of this class." *Id.* Pashukanis believed that the character of economic relationships determines the necessary legal form and the rules of law cannot add anything new or unexpected. *Id.* at 37.

83. Tay & Kamenka, *supra* note 81, at 225. Karl Marx's philosophy emphasized that "true law" must be universal, reflecting the inner laws of man's social being. *Id.* at 229. Marx saw law as a form of alienation which tore people out of their social and material context. *Id.* His moral ideal was the rational, free and truly human society. *Id.* Marx's *Das Kapital*, published in 1872, provided the philosophical basis for communism. Shanker, *Yeltsin Quits; Soviet Party Exodus Looms*, Chi. Tribune, July 13, 1990, at 1, col. 1.

84. Tay & Kamenka, *supra* note 81, at 225.

85. *Id.* at 224. In his *Communist Manifesto*, Marx claimed that the history of society was the history of class struggles. *Id.* at 230. Marx invested the formal categories of classical economics—labor, capital, rent and trade—with sociological reality, unmasking them as "classes" engaged in production and in an inevitable struggle with each other. *Id.* According to Marx, the state and law were class-states and class-law and the modern capitalist state was the executive committee of the bourgeoisie. *Id.*

86. *Id.* at 224.

87. O. IOFFE & P. MAGGS, *supra* note 79, at 31. In 1898, Lenin founded the Social

vanguard of the working class, whose destiny was to continue long after the revolution.<sup>88</sup> Lenin believed that the party must rule the state, but not become the state.<sup>89</sup> Lenin's Decree No. 1 of 1917 abolished the old system of courts, the Procuracy and bar associations and replaced them with revolutionary tribunals and people's courts.<sup>90</sup> These tribunals functioned as the punitive enforcers of political justice while the people's courts tried only minor criminal cases.<sup>91</sup> The need to combat crime, however, resulted in the reestablishment of the bar associations in 1918, the Procuracy in 1922 and the Cheka in late 1917.<sup>92</sup>

The period of the New Economic Policy ("NEP") from 1921-28 was one of the most active periods of judicial reform in Soviet history.<sup>93</sup> During this time, the more than 400 decrees published during 1917-21 were codified into what Lenin termed "temporary compromises,"<sup>94</sup> including the 1924 Constitution and the All-Union Fundamental Principles of Criminal Justice.<sup>95</sup> Yet the Communist goal to see the state and law wither away still persisted.<sup>96</sup>

### B. Joseph Stalin

Joseph Stalin is said to be the father of modern Soviet law.<sup>97</sup> While Lenin believed in a government of men and not laws, Stalin believed that

Democratic Party of Russia, the predecessor of the Bolshevik Party. Shanker, *supra* note 83, at 1, col. 1. Lenin came to power in 1917 when the revolution overthrew Czar Nicholas II with the Bolshevik coup. *Id.* Lenin died in 1924. *Id.*

88. W. BUTLER, *supra* note 37, at 152.

89. *Id.*

90. Smith, *The Impact of Socialism on Soviet Legal Institutions and Procedures*, 23 COLUM. J. TRANSNAT'L L. 315-16 (1985). Lenin proposed that the elaborate system of judicial administration constructed during the last fifty years of the tsarist regime be replaced by a "very simple machine." *Id.*

91. *Id.* The tribunals consisted of one professional judge and six people's assessors. *Id.* The people's courts tried criminal prosecutions involving sentences of up to two years and civil disputes up to 3,000 rubles. *Id.* One professional judge and two temporary people's assessors presided over the courts. *Id.*

92. *Id.* The Cheka was the "Extraordinary Commission for Combatting Counterrevolution and Sabotage"; it was resurrected at the same time as the NKVD. *Id.*

93. *Id.*

94. *Id.* at 316-17.

95. *Id.* at 317.

96. *Id.*

97. Osakwe, *Prerogativism in Modern Soviet Law: Criminal Procedure*, 23 COLUM. J. TRANSNAT'L L. 331, 334 (1985). Stalin became general secretary of the Communist Party in 1922. Shanker, *supra* note 83, at 1, col. 1.



the rule of men could be better achieved through the rule of law, so law could be a weapon at the disposal of the party and the state.<sup>98</sup> To Stalin, the victory of socialism did not mean the withering away of law in the Soviet Union; it meant that the role of law would continue to grow until a full Communist society actually was established.<sup>99</sup>

Stalin believed that in order for the Soviet system to survive, there must be a struggle to "overtake and surpass" the West.<sup>100</sup> In 1936, Stalin's wave of "purges" began, in which "counter-revolutionaries" often members of former political parties—were brought to trial.<sup>101</sup>

Since Lenin's time, extra-judicial repression against persons thought to be dangerous to the state has played a more important role than actual court trials for political crimes.<sup>102</sup> Under Stalin, the Soviet criminal law system played a major role in the protection of his personal dictatorship against persons he perceived as a political threat.<sup>103</sup> The Soviet justice system's current bad reputation stems from a widespread public perception that Lenin and Stalin subjected millions of innocent people to harsh punishment or execution.<sup>104</sup> Raoul Wallenberg was very likely one of these people after he was arrested by the NKVD in 1945 under the pretense of being a spy.

The expanded use of terror under Stalin led to the arrest and imprisonment in labor camps of countless Soviet citizens, a high percentage of whom were not guilty of any crime.<sup>105</sup> The Stalinist "purges" also led to a dismantling of the court system in which nearly all of the competent judges and lawyers either fled the country or disappeared.<sup>106</sup> Thus, by the 1940s, lower courts were staffed with judges loyal to the Stalinist regime, but with little or no formal legal education.<sup>107</sup> Under such conditions, if Raoul Wallenberg was tried for his alleged crime, he would have been tried by a highly biased tribunal.

In the mid-1930s the Soviet Union under Stalin chose to adopt

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98. Osakwe, *supra* note 97, at 334.

99. *Id.*

100. Smith, *supra* note 90, at 317.

101. The wave of purges lasted from 1936-38 and the trials were great show trials. R.W. MAKEPEACE, *MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW* 140-41 (1980). The secret police were normally used to implement the purges. *Id.* The major targets were the old intelligentsia, who were blamed for the failures that had taken place. *Id.*

102. O. IOFFE & P. MAGGS, *supra* note 79, at 285.

103. *Id.*

104. *Id.*

105. *Id.* at 286.

106. *Id.*

107. *Id.*

Western law.<sup>108</sup> This change was effectuated by the promulgation of the 1936 Constitution which reformed the courts and the Procuracy along Western lines.<sup>109</sup> Stalin favored Western law because of its stability, but desired a stability that would not interfere with his desire for total control.<sup>110</sup> Although the constitution provided legal forms and a "fictional" list of political rights for citizens, Stalin's system continued to permit direct action against political elements; thus law in a Western sense was not an obstacle to Stalin's aims.<sup>111</sup>

After Stalin's death, the state security police lost its power of arbitrary mass arrests and executions.<sup>112</sup> All criminal cases, including those involving political crimes, were tried by a people's court by regular judicial procedure.<sup>113</sup> Criminal codes were rationalized and shortened and criminal procedure granted a minimum of rights to defendants.<sup>114</sup> These reforms have remained in effect since the 1950s.<sup>115</sup> Notwithstanding this progress, certain elements of the "old" way of thinking still exist. Where any crime, civil action or administrative action has "political" implications, the rule of law gives way to arbitrariness at the operation and planning levels of government.<sup>116</sup> In other words, the entire purpose of civil law is to harness the energy of the Soviet citizen to accomplish the goals of the party.<sup>117</sup>

*C. Raoul Wallenberg Was a Victim of the Stalinist Regime;  
Efforts to Discover the Truth Are Thwarted*

Raoul Wallenberg is a glaring example of the terror and excesses of the Stalinist regime. He was arrested at the peak of the NKVD's power to arrest those people believed to be enemies of the party. "Undoing" these so-called crimes is difficult because it involves shedding many of the old layers of Soviet ideology, obeying domestic and international laws and treaties and taking responsibility for atrocities committed during Stalin's

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108. Osakwe, *supra* note 97, at 333.

109. *Id.* The constitution promised constitutional rights, similar to those of other countries, to citizens, legal procedures were regularized and all formal civil law codes from prior years were left intact. *Id.*

110. *Id.*

111. *Id.*

112. O. IOFFE & P. MAGGS, *supra* note 79, at 287.

113. Smith, *supra* note 90, at 318.

114. O. IOFFE & P. MAGGS, *supra* note 79, at 287.

115. *Id.*

116. Osakwe, *supra* note 97, at 334.

117. *Id.*

regime.

Efforts to force the Soviets to release information concerning Wallenberg have failed. A paramount example of the Soviet's lack of cooperation is the case of *Von Dardel v. Union of Soviet Socialist Republics*.<sup>118</sup> In February 1984, two Swedish citizens sued the Soviet Union on behalf of Raoul Wallenberg in federal district court seeking declaratory and injunctive relief and damages for unlawful seizure, detention and possible wrongful death.<sup>119</sup> At the time of his arrest in 1945, Wallenberg was a Swedish diplomat, now considered an "internationally protected person" under American law.<sup>120</sup> Under the Act for Prevention and Punishment of Crimes Against Internationally Protected Persons, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender.<sup>121</sup> Wallenberg's kidnapping is in violation of the act because Wallenberg is an honorary citizen of the United States and his mission to save Hungarian Jews was funded by the American War Refugee Board.<sup>122</sup> When the statute was enacted in 1976, however, the Soviet Union would not pay any regard to United States law.

The Soviet Union at first did not answer the complaint or appear in court; it merely returned the documents to the United States Embassy in Moscow along with a letter claiming absolute immunity to suit in non-Soviet courts.<sup>123</sup> The District Court entered a default judgment in favor

118. 623 F. Supp. 246 (D.D.C. 1985).

119. Raoul Wallenberg's half-brother, Guy von Dardel, and legal guardian, Sven Hagstromer, brought this suit on Wallenberg's behalf. *Id.*

120. *Id.* at 262. In 1976, Congress passed the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, 18 U.S.C. §§ 1116, 1201, 112, 970, 878, 11. The act defines "internationally protected person" as:

any . . . representative, officer, employee, or agent of the United States Government, or international organization who at the time and place concerned is entitled pursuant to international law to specific protection against attack upon his person, freedom or dignity, and any member of his family then forming part of his household.

*Id.* § 1116(b)(4)(B). Similar prohibitory and jurisdictional language governs the kidnapping of such a person under 18 U.S.C. § 1201(a)(4) & (e).

121. 18 U.S.C. § 1116(c).

122. 18 U.S.C. § 1201(a)(4); see also *Von Dardel*, 623 F. Supp. at 262. For a discussion of Wallenberg's honorary citizenship, see *infra* note 195. For a discussion of Wallenberg's mission to Hungary, see *supra* notes 5-16 and accompanying text.

123. *Von Dardel*, 623 F. Supp. at 250. Under this absolute sovereign immunity theory asserted by the USSR, a sovereign is immune from all suits brought without its consent against it in the courts of another country. 26 DEP'T ST. BULL. 984 (1952). The United States abandoned this theory in favor of a more liberal theory of restrictive immunity. For

of Wallenberg's representatives based on existing standards of international law, federal law and United States and Soviet treaties which supersede sovereign immunity.<sup>124</sup>

While the von Dardel family "won" the first round of this case, the victory was meaningless, because in June 1989, the Soviet Union made a special appearance in federal court specifically to contest jurisdiction, to move for relief from default judgment and to move for dismissal.<sup>125</sup> The court vacated the default judgment and dismissed the complaint, holding that the Soviet Union had not waived sovereign immunity when it failed to appear in court in 1985, and therefore, among other reasons, there was never jurisdiction over the subject matter.<sup>126</sup> Hence, the fate of Raoul Wallenberg is still a mystery.

Today there is a great deal of hope for solving the Wallenberg mystery. The Soviet Union finally is showing a willingness to obey domestic law and international treaties and forsake ideological goals for practical goals.

#### IV. THE SOVIET UNION IS NOW MORE WILLING TO ABANDON MARXIST IDEOLOGY IN FAVOR OF OBEYING A TRADITIONAL VIEW OF LAW

When Soviet president Mikhail Gorbachev addressed the 43rd session of the United Nations General Assembly on December 8, 1988,<sup>127</sup> he

a discussion of these theories, see Note, *The Foreign Sovereign Immunities Act of 1976 Does Not Preclude U.S. Courts from Exercising Jurisdiction Over the USSR for Soviet Violations of Diplomatic Immunity—Von Dardel v. USSR*, 623 F. Supp. 246 (D.D.C. 1985), 55 U. CIN. L. REV. 923 (1987).

124. *Von Dardel*, 623 F. Supp. at 253. The plaintiffs referred specifically to the Vienna Convention on Diplomatic Relations. See Vienna Convention, *supra* note 3; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 [hereinafter Internationally Protected Persons Convention].

The plaintiffs also alleged that by virtue of its decision to default, the Soviet Union failed to raise sovereign immunity as an affirmative defense, and thus waived it as a defense. *Von Dardel*, 623 F. Supp. at 250-53.

125. *Guy von Dardel, et al. v. USSR*, 736 F. Supp. 1 (D.D.C. 1990).

126. *Id.* at 8. The other reasons for dismissing the complaint and vacating the default judgment are the Internationally Protected Persons Convention did not conflict expressly with the FSIA's grant of immunity, and the plaintiffs could not meet the requirements of the "non-commercial tort" exception to immunity under the FSIA. *Id.*

127. This was the first time in United Nations history that the head of the Soviet state addressed the international community from the United Nations rostrum. *Commences UN Speech*, Moscow TASS in English, Dec. 7, 1988, in Foreign Broadcast Information Services [FBIS-SOV] 88-236, Dec. 8, 1988, at 11.

proclaimed that current legal reform in the Soviet Union has the unprecedented objective of establishing a legal regime in accordance with international human rights standards.<sup>128</sup> Adherence to human rights standards will provide an opportunity for improved relations between the Soviet Union and other countries and ultimately a resolution of the Raoul Wallenberg case. The Soviet Union should be more willing in 1990 to observe domestic law and international treaties than it has been throughout its history.<sup>129</sup>

### A. *The Procuracy Under Perestroika*

Under article 164 of the Soviet Constitution, the procurator general and his subordinate procurators are vested with "Supreme power of supervision over the strict and uniform observance of laws by all ministries and institutions subordinated to them, as well as by public servants and citizens of the USSR."<sup>130</sup> With respect to the judicial system, the Procuracy's functions are broad.<sup>131</sup> It has the power to order the arrest of those suspected of crime, and appoint investigators to conduct pre-trial investigations of major criminal cases.<sup>132</sup>

128. *At U.N. Gorbachev Pledges Military Cuts*, Pravda, Dec. 8, 1988, at 1, translated in 40 CURRENT DIG. SOVIET PRESS (No. 49) 1-7 (1988); see also *M.S. Gorbachev's United Nations Address*, Pravda, Dec. 8, 1988, at 1-2, translated in Foreign Broadcast Information Service [FBIS-SOV] 88-236, Dec. 8, 1988, at 1.

129. This is especially true since Gorbachev won the 1990 Nobel Peace Prize in recognition of his initiatives in promoting international peace, including bringing about sweeping political change to the Soviet Union and revolutionizing the Kremlin's foreign policy. Rule, *Gorbachev Gets Nobel Peace Prize for Foreign Policy Achievements*, N.Y. Times, Oct. 16, 1990, at A1, col. 1.

130. KONST. SSSR (1977) art. 164, reprinted in HUMAN RIGHTS SOURCEBOOK 220 (A. Blaustein, R. Clark & J. Sigler eds. 1987).

Czar Peter the Great founded the Procuracy in 1722. H. BERMAN, JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW 240 (rev. ed. 1963). The Procuracy is now, as it was in pre-revolutionary Russia (prior to 1864) the "eye of the state," designated to perform the ultimate enforcement of Soviet law. *Id.* at 247.

The Procuracy's supreme supervisory power takes many diverse forms. *Id.* Procurators keep watch over the entire system of administration to see that executive and administrative bodies do not overstep their legal authority. *Id.* at 238. They also function as consultants at sessions of local city councils. *Id.* The procurators also supervise the legality and correctness of actions of the state security agencies, as well as the police, criminal investigators and corrective labor institutions. *Id.* at 238-39.

131. *Id.* at 239.

132. *Id.* The Procuracy has been likened to a combination of the functions of the United States Attorney General's office, Congressional investigating committees, grand juries and public prosecutors. *Id.*

In his 1986 address to the Twenty-seventh party Congress, Gorbachev outlined some basic themes of legal *perestroika*.<sup>133</sup> Gorbachev advocated enhancing the supervisory power of the Procurator's office and swiftly completing preparation of a constitutionally-created law on procedures for legally challenging the actions of government officials.<sup>134</sup> In 1987, as a result of a resolution passed by the Central Committee of the Communist party of the Soviet Union, procurators were vested with many new powers.<sup>135</sup> These include the right to issue binding directives to suppress immediately clear violations of the law and suspend unlawful acts, decisions and directives against which appeals have been lodged.<sup>136</sup>

Procurator General Aleksandr Sukharev<sup>137</sup> suggests as one of *perestroika*'s goals the reduction in the use of imprisonment as punishment.<sup>138</sup> He also supports setting up an investigative unit which would be independent of the procurator general.<sup>139</sup>

### B. Human Values Under Perestroika

One of the goals of *perestroika*<sup>140</sup> and *glasnost* is to form a state ruled by law based on general human values.<sup>141</sup> Such values include supremacy of the law, mutual responsibility of the state and citizens and guaranteed rights of the individual.<sup>142</sup> Soviet academician V.N. Kudry-

133. See Smith, *The Procuracy, Citizens' Rights and Legal Reform*, 28 COLUM. J. TRANSNAT'L L. 77, 78 (1990).

134. *Id.*

135. *Id.* at 81. The resolution was entitled "On Measures to Increase the Role of Procuratorial Supervision in Strengthening Socialist Legality and Law and Order." *Id.* It criticized the Procuracy for paying insufficient attention to safeguarding citizens' rights and interests. *Id.* Consequently, the Central Committee deemed it necessary to restructure the functions and organization of the Procurator's Office. *Id.*

136. *Id.*; see *V Tsentral'nom Komitete KPSS* (In the Central Committee of the CPSU), *Pravda*, June 19, 1987, at 1, col. 1, cited in Smith, *supra* note 133, at 81 n.23.

137. Sukharev was the former minister of justice of the Russian Republic. Smith, *supra* note 133, at 82. He was promoted in February 1988 to first deputy procurator general and in May 1988 replaced A. Rekunkov in the top post. *Id.*

138. *Procurator General Answers Phone-In Questions*, Moscow Domestic Service, Jan. 28, 1989 broadcast, translated in Foreign Broadcast Information Service [FBIS-SOV] 89-019, Jan. 31, 1989, at 66.

139. *Id.*

140. *Perestroika* means "restructuring." OXFORD RUSSIAN-ENGLISH DICTIONARY 511 (2d ed. 1984).

141. "Rule of law" generally means that individual rights, not the state's rights, are paramount. See Beissinger, *The Party and the Rule of Law*, 28 COLUM. J. TRANSNAT'L L. 41, 45-47 (1990).

142. *Academician Kudryavtsev Discusses Human Rights*, *Izvestiya*, Jan. 26, 1989, at 5,

avtsev has commented that the task of forming this new legal regime is "to maintain, establish, and protect by legal means not only people's political rights but also their social rights; to affirm democracy, citizens' equality before the law, social justice in the interests of working people, humanism, and peace between the peoples."<sup>143</sup> Kudryavtsev believes that "the more fully questions of human rights and freedom of the individual are resolved in accordance with general human standards and norms in particular countries, including our own, the smaller the burden of mistrust, mutual recriminations, and suspicion that weighs on relations between states."<sup>144</sup> He postulates that the more favorable the international situation and "the thinner the ice of confrontation and mistrust," the easier it will be to resolve humanitarian legal questions.<sup>145</sup> Openness between nations would be a perfect opportunity to begin discourse in an attempt to resolve the Raoul Wallenberg case.

Such discourse has begun. In March 1989, Soviet president Gorbachev publicly accepted Soviet responsibility for the "Katyn Forest Massacre."<sup>146</sup> In the spring of 1940, the Stalinist NKVD methodically murdered more than 4,400 Polish military officers who were taken prisoner after the Soviet occupation of eastern Poland.<sup>147</sup> Stalin blamed Hitler for the crime and Hitler blamed Stalin.<sup>148</sup> The Soviets continued to blame the Germans until 1989 when, as a result of pressure from historians and journalists, the Soviet Union gradually admitted guilt.<sup>149</sup> In April 1990, President Gorbachev conveyed cartons of documents to Polish president Wojciech Jaruzelski as evidence of Soviet culpability.<sup>150</sup>

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*translated in Foreign Broadcast Information Service [FBIS-SOV] 89-019, Jan. 31, 1989, at 68. Kudryavtsev commented on Soviet president Gorbachev's United Nations speech. Id. at 67. He notes particularly the remarkable changes that are taking place in the Soviet Union regarding human rights and moral values in the area of crime and punishment. Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Fein, *Gorbachev Hands Over Katyn Papers*, N.Y. Times, Apr. 14, 1990, at L5, col. 1. Gorbachev gave Polish president Wojciech Jaruzelski cartons of documents that Gorbachev said "indirectly but convincingly" proved that the Soviet secret police killed the soldiers and buried them in mass graves in the Katyn Forest. *Id.* The Katyn Forest is located in western Russia, near Smolensk. Tagliabue, *Poland Officially Shifts the Blame to Soviets for Wartime Massacre*, N.Y. Times, Mar. 8, 1989, at A1, col. 3. The bodies were unearthed by the Nazi troops in 1943. Fein, *supra*. The Germans blamed the Soviets for the murders, but Stalin blamed Hitler. *Id.*

147. Tagliabue, *supra* note 146, at A1, col. 3.

148. Fein, *supra* note 146, at A5, col. 1.

149. *Id.*

150. *Id.*

The Soviet Union continues to assert that Raoul Wallenberg died in prison in 1947, although his arrest was one of Stalin's "excesses." The Soviet Union also claims that all documents relating to Wallenberg were destroyed by the NKVD.<sup>151</sup> Without adequate proof that Wallenberg died of a heart attack,<sup>152</sup> however, it is possible that he is either still alive or was executed by Stalin. Further, since the Soviets recently have shown some good faith by providing the Wallenberg family with an assortment of Raoul's personal belongings found in the Lubianka prison archives,<sup>153</sup> it is possible that Wallenberg's file was not, as the Soviets claim, destroyed. Gorbachev's public apology for the Katyn Forest Massacre suggests a willingness by the Soviet government to reveal the truth about past atrocities, and so may provide the key to a solution of the Wallenberg disappearance.

### C. Progress in the Realm of Human Rights Through Obeying the Law

"Real democracy does not exist outside or above the law," according to President Gorbachev.<sup>154</sup> Soviet domestic law enforcement bodies can contribute to the security of the international legal order.<sup>155</sup> Gorbachev had suggested in his speech before the United States General Assembly that to reach his goal of "the internationalization of dialogue and [the] negotiating process," the USSR should observe international laws and treaties and focus on "universal human values."<sup>156</sup>

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151. For a discussion of the likelihood that all documents pertaining to Wallenberg were destroyed, see *supra* note 72 and accompanying text.

152. The only proof of Wallenberg's death is the 1947 report by the Lubianka prison doctor, which was released in 1957, after the doctor had died. See *supra* note 60 and accompanying text.

153. See *supra* notes 73-74 and accompanying text; see also Keller, *supra* note 78, at A2, col. 3. The Soviet Union has agreed to open prisons and archives to an international commission investigating the fate of Wallenberg. *Id.* Investigators say the promise of Soviet collaboration—especially by the KGB, whose files are thought to be the richest potential source of information—offers the best chance to date of proving or disproving the Soviet assertion that Wallenberg died in prison in 1947. *Id.*

154. Gorbachev made this comment in his speech to the opening of the Plenum of the Central Committee of the Communist Party on January 27, 1987, at which he laid out a series of reforming principles for the soviet political system. *Gorbachev Continues 'Democratisation' Campaign with Proposals*, COUNTRY REPORT (USSR), Mar. 4, 1987, No. 1.

155. Vereshchetin & Mullerson, *International Law in an Interdependent World*, 28 COLUM. J. TRANSNAT'L L. 291, 299 (1990).

156. *M.S. Gorbachev's United Nations Address*, *supra* note 128, at 1-2. Gorbachev promoted dynamic political dialogue, to facilitate practical solutions to many problems. *Id.*



In order to make progress in the realm of human rights, the Soviet Union must accept that human rights are deemed inherent in individuals, rather than gifts from the state.<sup>157</sup> Gorbachev advocates adherence to the Universal Declaration of Human Rights "to improve its own conditions at home for the observance and defense of citizens' rights."<sup>158</sup>

In a step toward focusing on universal human values, the All-Union Legal Correspondence Institute decided to introduce a special course for Soviet law students on the history, theory and practice of human rights.<sup>159</sup> The course looks at human rights in relation to restructuring socialism and creating a society which no longer involves arbitrariness and lawlessness, as it did during the Stalin regime.<sup>160</sup> This course, which commenced in September 1989, is believed to be the first of its kind not only in the Soviet Union, but also in the socialist legal systems of Eastern Europe and Mongolia.<sup>161</sup> Teaching law students the importance of human rights is one critical step for the Soviet Union toward breaking away from the old system of rejecting law.

In light of changes in Soviet attitude toward the power vested in the Procuracy by the Code of Criminal Procedure and the Criminal Code, perhaps the Wallenberg family might find recourse within the Soviet system.<sup>162</sup> President Gorbachev told the General Assembly: "The world in which we live today is fundamentally different from that at the beginning and even the middle of this century. And it continues to change in all its basic aspects."<sup>163</sup> It follows from these words that the Soviet

157. This follows a basic tenet of the Universal Declaration of Human Rights which provides: "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, arts. 3, 6, G.A. Res. 217, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

158. *M.S. Gorbachev's United Nations Address*, *supra* note 128, at 1-2.

159. Butler, *Perestroika and the Teaching of Human Rights Law in the USSR*, in PERESTROIKA AND INTERNATIONAL LAW 297 (W. Butler ed. 1990). The decision to teach this course was made in January 1988. *Id.*

One method of how this course presents human rights issues is illustrated in topic 13, which addresses the activities of the party and people in overcoming the negative consequences of the personality cult and stagnation through the revolutionary *perestroika* of society, democratization and *glasnost*, expanding and enriching human rights and enhancing the effectiveness of their guarantee. *Id.* at 305.

160. *Id.*

161. *Id.* More than 300 students enrolled for the course taught by Professor Boris Nazarov. *Id.*

162. It has been suggested that legal cultures evolve slowly and that the world "cannot reasonably expect a half century of Stalinist legal practice to be overturned in only a few years." Smith, *supra* note 133, at 93.

163. Tunkin, *On the Primacy of International Law in Politics*, in PERESTROIKA AND INTERNATIONAL LAW, *supra* note 159, at 5.

Union is willing to abandon its disdain for law and is willing to accept its own written laws, procedures and international treaties to which it is a party.

#### V. ANALYSIS OF SOVIET LEGAL OBLIGATIONS UNDER SOVIET AND INTERNATIONAL DIPLOMATIC LAWS

Grotius said in 1625: "Now there are two rights of ambassadors which we see are everywhere referred to the law of nations: The first is that they be admitted; the second, that they be free from violence."<sup>164</sup> International law for the protection of diplomats and legations is one of the oldest areas of customary law, having roots in ancient Greece.<sup>165</sup> Diplomatic immunity is a fundamental principle of international law under which certain foreign officials are not subject to the jurisdiction of local courts or other authorities for official or personal activities.<sup>166</sup> This ensures that representatives from other states are able to carry out their official business without interference from the host country, enabling the diplomat to work in a free, independent and secure environment.<sup>167</sup>

The importance of protecting diplomats relates to the interactive world of reciprocity between states; just as a state wishes to have its own diplomats protected, so it must reciprocate in hosting diplomats from other states.<sup>168</sup>

Nevertheless, the Soviet position toward international law relating to diplomats must be seen in light of its Marxist ideological roots, which supports the notion that treaties in general are entered into for political expediency.<sup>169</sup> There is thus a question as to whether the Soviets, when entering into diplomatic treaties, actually consent to being bound by them.<sup>170</sup> At the time of Raoul Wallenberg's arrest, the Soviets were not interested in abiding by diplomatic treaties; however, as *glasnost* progresses, it is likely that the Soviet Union will begin adhering to those

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164. C. ASHMAN & P. TRESKOTT, *DIPLOMATIC CRIME* (1988), cited in L. CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 254-55 (1989). Hugo Grotius was a Dutch jurist and statesman in the early 17th century. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 843 (2d ed. 1987).

165. L. CHEN, *supra* note 164, at 254.

166. Roosevelt, *Diplomatic Immunity and U.S. Interests*, in DEP'T ST. BULL., Oct. 1987, at 29.

167. *Id.*

168. *Id.*

169. Note, *Alien Tort Claims in the 1980's: Von Dardel v. Union of Soviet Socialist Republics*, 12 BROOKLYN J. INT'L L. 469, 497 (1986) (citing T. TARACOUZIO, *THE SOVIET UNION AND INTERNATIONAL LAW* 10-11 (1935)).

170. *Id.*

agreements.

At the time of his arrest, Raoul Wallenberg was second secretary in the Swedish Legation in Budapest<sup>171</sup> and as such enjoyed full diplomatic status.<sup>172</sup> As a diplomat, he was entitled to special privileges and immunities under Soviet law<sup>173</sup> and international law.

In addition to the obligations placed on the Soviet Union by international law and treaty law, Soviet domestic law mandates the special treatment which must be accorded to diplomats on Soviet territory.<sup>174</sup>

At the time of Wallenberg's arrest and detention,<sup>175</sup> the Soviet Union had in force the Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR, which guaranteed that members of diplomatic missions of foreign states would enjoy certain personal immunities, one of which was protection from arrest or detention.<sup>176</sup> The Soviet Union's arrest of Wallenberg<sup>177</sup> clearly vio-

171. See *supra* note 13 and accompanying text.

172. *Id.*

173. Vedomosti Verkhovnoy Sovieta SSSR provides: "It is necessary that relations between states be founded on the principles of . . . respect for sovereignty and for national independence." Declaration of the Supreme Soviet of the USSR (Feb. 9, 1955), reprinted in Y. Kaufman, *supra* note 21, at 31.

174. See generally *infra* notes 178-80 and accompanying text. Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR, UK RSFSR and UPK RSFSR. *Id.*

175. Wallenberg was arrested in mid-January 1945. See *supra* notes 26-37 and accompanying text.

176. Section 2 of the Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR, (1927) provides that diplomats:

(a) shall enjoy personal immunity, by virtue of which they may not be subject to arrest or detention in administrative or judicial proceedings;

(b) shall not be subject to the jurisdiction of the judicial institutions of the USSR or of the union republics in criminal cases, with the exception of those instances when there is consent thereto by the government of the appropriate foreign state . . . ;

(c) shall have the right to . . . unobstructed receipt from abroad, and also of shipment abroad, of printed matter within the limits of personal use.

Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR (1927), reprinted in Y. Kaufman, *supra* note 21, at 34.

These principles were repeated in the Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR (1966), which added that a representative of a foreign state in a third country, who is travelling in the Soviet Union, "shall enjoy personal inviolability and the other immunities which are necessary for ensuring their trip." Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR, translated and reprinted in SOVIET STATUTES, *supra* note 4, art. 18, at 46.

177. Wallenberg was arrested in 1945, eighteen years after the 1927 statute had been

lated this statute.

The Soviet Code of Criminal Procedure recognizes diplomatic immunity.<sup>178</sup> Under the Code, Raoul Wallenberg possessed "the right of diplomatic immunity"<sup>179</sup> and, so far as is known, never requested or gave his consent to actions taken against him by the Soviet authorities. His arrest and detention are thus violations of Soviet criminal law.

The Soviet Criminal Code provides that crimes committed on Soviet territory by diplomatic representatives of foreign states are not subject to the jurisdiction of Soviet courts, but rather shall be decided by diplomatic means.<sup>180</sup> Even if the Soviet Union had a valid case against Wallenberg for espionage,<sup>181</sup> his incarceration nevertheless violated the Criminal Code.

Diplomatic immunity is a general principle of international law.<sup>182</sup> The Soviet Union pledged to protect diplomats on its territory when it signed the Vienna Convention on Diplomatic Relations in 1961.<sup>183</sup> The treaty provides that a diplomat shall not be liable to any form of arrest or

put into force.

178. Article 33 of the Code of Criminal Procedure provides, in pertinent part: "With respect to persons possessing the right of diplomatic immunity, procedural actions provided for by the present Code shall be carried out only upon their request or with their consent. Consent for the carrying out of such actions shall be obtained through the Ministry of Foreign Affairs." UPK RSFSR, *reprinted in SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 214* (H. Berman & J. Spindler trans. 2d ed. 1972) [hereinafter *SOVIET CRIMINAL LAW*]. It is not likely that Wallenberg gave his consent to his detention or to arrest when he and his driver were accompanied by a Soviet motorcade from Budapest on the way to Debrecen, but then rerouted to the Lubianka prison. See Teitel, *supra* note 58, at 18.

179. UPK RSFSR, *reprinted in SOVIET CRIMINAL LAW*, art. 33, at 214.

180. Article 4 of the Criminal Code provides, in pertinent part:

In the event that crimes are committed on the territory of the Russian Soviet Federated Socialist Republic by diplomatic representatives of foreign states and other citizens who, in accordance with prevailing laws and international agreements, are not subject to criminal jurisdiction in Soviet judicial institutions, the question of their criminal responsibility shall be decided by diplomatic means.

UK RSFSR, *reprinted in SOVIET CRIMINAL LAW*, *supra* note 178, at 126.

181. One of the possible reasons for Wallenberg's arrest was espionage. The Soviets may have believed that Wallenberg was an American agent with CIA ties or a "double-agent" for American and German intelligence. See E. LESTER, *supra* note 5; Ronay, *supra* note 45, at 10, col. 7.

182. See generally Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 *INT'L & COMP. L.Q.* 53 (1988) (asserting that the status of diplomatic agents has been recognized by the peoples of all nations from ancient times).

183. See Vienna Convention, *supra* note 3.

detention, that "[t]he receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity."<sup>184</sup> The Vienna Convention does not define the word "attack"; however, it has been held that kidnapping and abducting a diplomat constitute an attack of his person.<sup>185</sup> The fact that Wallenberg was denied communication with his family and government would be considered an attack on his freedom, also condemned under the Vienna Convention.<sup>186</sup>

The Vienna Convention also provides that a diplomatic agent in the territory of a third state shall be accorded "inviolability and such other immunities as may be required to ensure his transit or return."<sup>187</sup> In addition to the Vienna Convention, in 1973, the United Nations General Assembly adopted a treaty to prevent the punishment of internationally protected persons.<sup>188</sup> The treaty protects diplomats and provides sanctions against nations which violate diplomatic immunity.<sup>189</sup>

The Soviet Union also is bound by a bilateral treaty with Sweden, concluded in an exchange of letters, which was in force at the time of Wallenberg's arrest.<sup>190</sup> In this exchange of letters, the two countries formally undertook to protect each other's diplomats.<sup>191</sup> The Soviet letter to Sweden pledged that all diplomats of Sweden as a "most favored nation," would enjoy all the privileges and immunities accorded to Soviet agents of the same rank.<sup>192</sup> The language of the treaty does not limit it to Swedish diplomats serving in the USSR, but provides that the consular representatives of Sweden, wherever they are stationed, will be accorded special privileges and immunities.<sup>193</sup>

The Soviet Constitution, which was rewritten and re-adopted in 1977, provides that it is the international duty of every Soviet citizen "to

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184. *Id.* art. 29.

185. Brown, *supra* note 182, at 72.

186. After his arrest, Wallenberg was not permitted to contact other members of the Swedish Legation in Budapest, the Foreign Office in Stockholm or members of his family. Y. Kaufman, *supra* note 21, at 29.

187. Vienna Convention, *supra* note 3, art. 40, para. 1.

188. Internationally Protected Persons Convention, *supra* note 124. The Soviet Union was a party to this treaty. *Id.*

189. Von Dardel v. USSR, 623 F. Supp. 246, 255 (D.D.C 1985).

190. This treaty was concluded in an exchange of letters between the Deputy People's Commissar of Foreign Affairs and the Ambassador of Sweden in the USSR on February 2, 1927. Y. Kaufman, *supra* note 21, at 33.

191. *Id.*

192. *Id.*

193. *Id.* at 34.

promote friendship and cooperation with peoples of other lands and help maintain and strengthen world peace."<sup>194</sup> This provision was not yet in effect at the time of Wallenberg's arrest in 1945. The Soviets, however, are now recognizing that with the shedding of each layer of Marxist ideology, they join other nations in the move toward progressive improvement of mutual understanding. Uncovering information about Wallenberg would enhance international relations between the Soviet Union and the countries which have taken a strong interest in the Wallenberg mystery.<sup>195</sup>

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194. KONST. SSSR (1977), art. 69, at 758. The constitution was adopted originally in 1936. *Fundamental Human Rights in the USSR*, 1946 Y.B. ON HUM. RTS. 308, U.N. Sales No. 1948.XIV.1.

The constitution was adopted again at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation, on October 7, 1977. THE CRIMINAL JUSTICE SYSTEM OF THE USSR 217 (M. Bassiouni & V. Savitski eds. 1979) [hereinafter CRIMINAL JUSTICE SYSTEM].

195. For example, Wallenberg is an honorary citizen of the United States by a resolution introduced by Congressman Tom Lantos of California. Joint Resolution of Congress Proclaiming Raoul Wallenberg to be an Honorary Citizen of the United States, Pub. L. No. 97-54, 95 Stat. 971 (1981). Lantos and his wife Annette both escaped the Nazis in Budapest because of Raoul Wallenberg. See generally E. LESTER, *supra* note 5, introduction, at 146-47 (describing the escape). Wallenberg is the second person in United States history to be voted by Congress as an honorary citizen—Winston Churchill was the first. See *U.S. Citizenship Voted for Swede Who Aided Jews*, N.Y. Times, Sept. 23, 1981, at A9, col. 1; *Von Dardel v. USSR*, 623 F. Supp. 246, 248 (D.D.C. 1985).

Wallenberg is also an honorary citizen of Israel and Canada. Telephone interview with David Matas, a Canadian attorney and a counsel to the International Wallenberg Commission (Oct. 14, 1990) [hereinafter Matas interview]. A bill was introduced in Parliament to give Wallenberg honorary British citizenship. *Bill for a Hero*, Daily Telegraph (London), Mar. 23, 1989, at 20, col. 1; Johnston, *Tory Launches Move to Give Wallenberg British Status*, Daily Telegraph (London), Mar. 4, 1989, at 6, col. 1. Recently, the first Parliamentary step was taken to erect a Wallenberg memorial in London. McMullan, *MPs Act on Wallenberg Memorial*, Press A. Limited, June 7, 1990. The promoter of the memorial, Tory David Amess, said, "I am not a Jew—I am a Catholic. But since memorials to this courageous man have already been erected in the United States, Canada and Israel, I feel Britain should do the same." *Id.* So far the British government has not objected to the memorial statute. Final approval must come from the House of Lords. *Id.*

Fourteen Raoul Wallenberg committees exist around the world, including one in the United States. Rosenthal, *Story With No End*, N.Y. Times, Nov. 25, 1988, at A31, col. 1. Wallenberg has been honored by the United States by President George Bush declaring October 5 as "Raoul Wallenberg Day." *Wallenberg Day Declared*, L.A. Times, July 28, 1989, pt. 1, at 17, col. 6. The Congressional Human Rights Award has been named after Wallenberg. *Dalai Lama Gets Congress' Human Rights Award*, L.A. Times, July 23, 1989, pt. 1, at 30, col. 3. The Raoul Wallenberg Humanitarian Award and Music Tribute also honors Wallenberg. Heard, *Wallenberg Awards Honor 5 Good Samaritans*, Chi. Tribune, Apr. 4, 1989, § C, at 16, col. 2. The third annual award was presented in 1989

## VI. ANALYSIS OF SOVIET OBLIGATIONS UNDER INTERNATIONAL AND DOMESTIC LAW

### A. *Background and Purposes*

The United Nations General Assembly consistently has maintained that incidents of gross violations of human rights are matters of international concern and require the attention of the United Nations.<sup>196</sup> The United Nations Charter embodies this belief in article 55: "[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>197</sup> Article 1 of the Charter envisages "international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms. . . ."<sup>198</sup>

The most important United Nations action towards achieving these goals was the General Assembly's approval in 1948 of the Universal Declaration of Human Rights (the "Universal Declaration").<sup>199</sup> In its preamble, the Universal Declaration envisions itself as a "common standard of achievement for all peoples and all nations" to promote respect

to five midwest residents. *Id.* At the corner of Beverly Boulevard and Fairfax Avenue in Los Angeles stands an 18-foot bronze statue of Wallenberg. Blume, *Statue Honors Diplomat Who Saved Jews*, L.A. Times, Dec. 5, 1988, pt. 1, at 28, col. 4. These are merely a few examples of how Wallenberg's name and image grace many awards, streets and statues around the world.

196. *The American Red Cross—Washington College Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983: The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U.L. REV. 99 (1983) [hereinafter *Role of International Bodies in Humanitarian Law*].

197. U.N. CHARTER art. 55, para. c. This belief in human rights resulted from circumstances leading to World War II and a desire to avoid a future war, as well as a conviction that respect for basic human rights should be achieved not only as an end in itself but also as a condition favorable to the maintenance of international peace and respect for law. L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 371-72 (3d ed. 1969).

The Soviet Union is a party to the United Nations Charter. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 10.8 (R. Lillich rev. ed. 1988). The only significant state not a party to the United Nations Charter is Switzerland. *Id.*

198. U.N. CHARTER art. 1, para. 3.

199. See Universal Declaration, *supra* note 157. The Soviet Union abstained from a vote on the Universal Declaration, along with seven other United Nations member states. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, *supra* note 197, at 440.5. Since the Universal Declaration was approved by a 48-0-8 vote, however, it is binding on the United Nations membership. *Id.*

for these rights and freedoms by "teaching and education" and by "progressive measures to secure their universal and effective recognition and observance."<sup>200</sup>

Human rights under the Universal Declaration are urgent goals, the pursuit of which is mandatory.<sup>201</sup> Human rights under the Declaration are "universal," which implies that they are applicable around the world.<sup>202</sup> Human rights exist independently of recognition or implementation in the customs or legal systems of nations. In promulgating the Universal Declaration, the United Nations attempted to set forth standards, rather than to codify these human rights within international law.<sup>203</sup> The standards set forth under the Universal Declaration are neither absolute nor without exception.<sup>204</sup> They are strong enough to transcend national standards and to justify international action on behalf of those individuals whose rights are violated.<sup>205</sup> These rights imply duties for individuals as well as governments, and they establish minimum standards of decent social and governmental practice.<sup>206</sup>

Descendants of the Universal Declaration include a number of international human rights treaties.<sup>207</sup> The international community, including the Soviet Union, reaffirmed its commitment to the Universal Declaration, in the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights.<sup>208</sup> These were approved in 1966 and are now international law.<sup>209</sup>

The issue of international responsibility for human rights is especially important because it establishes accountability for governments as well as

200. Universal Declaration, *supra* note 157, preamble.

201. See J. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 3 (1987).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 3-4.

207. *Id.* These include, as pertinent to this article: the European Convention on Human Rights, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), and the International Covenant on Civil and Political Rights. G.A. Res. 2200, 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316 [hereinafter International Covenant].

208. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); see also J. NICKEL, *supra* note 201, at 6.

209. J. NICKEL, *supra* note 201, at 6. Once they were approved in 1966 the covenants required the signatures of 35 countries in order to be binding on the signatories. *Id.* The thirty-fifth nation signed in 1976 and now they are law. *Id.*



individuals.<sup>210</sup> A number of ideas have been expressed to accommodate international human rights accountability, including: improving techniques for fact-finding, conciliation and good offices; and examining ways and means for establishing and effectuating the international responsibility of governments.<sup>211</sup>

As a member of the United Nations, the Soviet Union is obligated to follow United Nations policy set forth in the covenants, treaties and the United Nations Charter.

### *B. Specific Provisions of Soviet and International Law*

The 1936 Soviet Constitution, in effect at the time of Wallenberg's arrest, specifically provides that "[t]he USSR affords the right of asylum to foreign citizens persecuted for . . . their struggle for national liberation."<sup>212</sup> As a diplomat on a peace mission, Wallenberg should have been free from persecution. His arrest and continued detention<sup>213</sup> are in violation of the Soviet constitutional provision guaranteeing respect for the individual and the rights and freedoms of citizens.<sup>214</sup>

Soviet law explicitly protects individuals from arbitrary arrest and detention. The Soviet Constitution provides that: "No one may be arrested except by a court decision or on the warrant of a procurator."<sup>215</sup> Procedures for detention of a person suspected of committing a crime are outlined in the Code of Criminal Procedure and Fundamentals of Criminal Procedure which, although they took effect after Wallenberg's arrest and

210. *Role of International Bodies in Humanitarian Law*, *supra* note 196, at 114.

211. *Id.* at 115.

212. KONST. SSSR (1936), art. 129, *reprinted in* 1946 Y.B. ON HUM. RTS., *supra* note 194, at 317. Wallenberg's mission at the time of his arrest was to discuss with the Soviet commander his plan for the relief and rehabilitation of Budapest. *See supra* notes 27-31 and accompanying text.

213. The author assumes that since there has not been an unsatisfactory resolution to the Wallenberg case, he may still be under detention.

214. KONST. SSSR (1977), art. 57, at 756-57. Article 57 provides:

Respect for the individual and protection of the rights and freedoms of citizens are the duty of all state bodies, public organisations, and officials. Citizens of the USSR have the right to protection by the courts against encroachments on their honour and reputation, life and health, and personal freedom and property.

*Id.*; *see* K. CHERNENKO, HUMAN RIGHTS IN SOVIET SOCIETY (1981). Konstantin Chernenko, Soviet president Mikhail Gorbachev's predecessor who died in 1985, wrote: "The right to inviolability of the person means that no one may be subjected to administrative persecution or arrest except by a court order or on the warrant of a prosecutor." *Id.* at 62. Chernenko also wrote: "Soviet criminal law establishes severe liability for illegal arrest or detention . . ." *Id.* at 63.

215. KONST. SSSR (1977), art. 54.

detention, would apply if he were still being detained today.<sup>216</sup> These procedures stipulate that an investigator may detain a person suspected of a crime only when that person has been caught committing the crime, when eyewitnesses have identified the person or where traces of the crime have been discovered on the person or his clothing.<sup>217</sup> There is no evidence that any of the conditions for detention had been met.<sup>218</sup> Moreover, the person suspected of the crime may be detained only if he has attempted to escape or if his identity has not been established.<sup>219</sup>

Raoul Wallenberg's arrest and detention also violated provisions of international law. Article 9 of the Universal Declaration provides: "No one shall be subjected to arbitrary arrest, detention or exile."<sup>220</sup> The Covenant on Civil and Political Rights, which the Soviet Union has signed,<sup>221</sup> makes the same guarantee in article 9, noting that "[e]veryone has the right to liberty and security of person."<sup>222</sup> No satisfactory reason was ever given for Wallenberg's imprisonment. Failure to disclose the reasons for his arrest violates specific provisions of the Covenant on Civil and Political Rights.<sup>223</sup>

It is unclear whether Wallenberg was formally sentenced before being jailed. Wallenberg allegedly said in 1947 that he was depressed because he was in jail without having been sentenced.<sup>224</sup> Speculators suggest that Wallenberg was sentenced to a term of twenty-five years in prison.<sup>225</sup>

216. UPK RSFSR, *reprinted in*, SOVIET CRIMINAL LAW, art. 11, at 209. Article 11 provides: "No one may be subjected to arrest except by decree of a court or with the sanction of a procurator." *Id.*; see *Fundamentals of Criminal Procedure of the USSR and the Union Republics*, art. 32 [hereinafter *Fundamentals of Criminal Procedure*], *reprinted in* CRIMINAL JUSTICE SYSTEM, *supra* note 194, at 247.

217. *Fundamentals of Criminal Procedure*, *supra* note 216, art. 32, at 235.

218. See generally Y. Kaufman, *supra* note 21, at 12-13. No reasons were given for Wallenberg's arrest; he could not have been caught spying while he was on a peace mission to liberate Budapest. *Id.*

219. *Fundamentals of Criminal Procedure*, *supra* note 216, art. 32, at 235.

220. Universal Declaration, *supra* note 157, art. 9.

221. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, *supra* note 197, at 170.42 (1986).

222. International Covenant, *supra* note 207, art. 9, para. 1.

223. *Id.* art. 9, para. 2. This provision provides: "Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him" *Id.* (emphasis added).

Wallenberg most likely was not informed of the reasons for his arrest when he was rerouted from Debrecen to Lubianka prison in Moscow. See *supra* notes 36-38 and accompanying text.

224. H. ROSENFELD, RAOUL WALLENBERG: ANGEL OF RESCUE 184 (1982). Wallenberg is alleged to have said he was being held on charges of spying. *Id.*

225. *Id.* at 180. The sentence was handed down either in 1945 or 1946. *Id.*

The penalty in the Soviet Union for espionage, the crime with which Wallenberg, as a foreigner, would have been charged, is fifteen years in prison with or without an additional two to five year term of exile.<sup>226</sup> If Wallenberg was actually sentenced to twenty-five years in prison, such a sentence would have contravened then-existing Soviet law.<sup>227</sup> As of 1990, Wallenberg would be in his forty-fifth year of detention<sup>228</sup> which would greatly exceed the maximum prison sentence allowed under Soviet law.<sup>229</sup>

This sentence also would have contravened international law. Both the Universal Declaration and the Covenant on Civil and Political Rights prohibit cruel, inhuman or degrading punishment or treatment.<sup>230</sup> In 1974, a United Nations subcommission adopted a resolution granting prisoners basic human rights, consistent with those rights enumerated in the Universal Declaration and Covenant on Civil and Political Rights.<sup>231</sup>

226. UK RSFSR, *reprinted in SOVIET CRIMINAL LAW*. The law includes espionage as an "especially dangerous crime against the state." *Id.* The law provides, in pertinent part:

[I]f the espionage is committed by a foreigner or person without citizenship, [that person] shall be punished by deprivation of freedom for a term of seven to fifteen years with confiscation of property, with or without additional exile for a term of two to five years, or by death with confiscation of property.

*Id.* Under this provision, the Criminal Code permits the death penalty for espionage, but the Soviet Union has never claimed that it executed Wallenberg for this crime. Y. Kaufman, *supra* note 21, at 24.

227. A term of 25 years is longer than the statutory seven to 15-year term for espionage. UK RSFSR, *reprinted in SOVIET CRIMINAL LAW*, art. 65, at 152. The Criminal Code was enacted in 1922. R.W. MAKEPEACE, *supra* note 101, at 101.

228. The author assumes there has been no satisfactorily conclusive evidence that Wallenberg died.

229. Under the 1937 Soviet legal structure, the maximum term of deprivation of freedom was 25 years. Y. Kaufman, *supra* note 21, at 23. In 1958, the maximum was reduced to 15 years, even for the most serious crime. *Id.* The crime of espionage carries the 15-year term. *Id.*

The Fundamental Principles of Criminal Legislation of the USSR and the Union Republics provides, in pertinent part: "Deprivation of freedom shall be established for a term not exceeding ten years, and for especially grave crimes, for crimes entailing especially grave consequences, and for especially dangerous recidivists in the instances provided for by the USSR and the union republic legislation, not exceeding fifteen years." Fundamental Principles of Criminal Legislation of the USSR and the Union Republics, art. 23 (1958) [hereinafter Fundamental Principles of Criminal Legislation], *reprinted in* Y. Kaufman, *supra* note 21, at 23-24.

230. Universal Declaration, *supra* note 157, art. 5; International Covenant, *supra* note 207, art. 7.

231. See Questiax, *Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Study of the Implication for Human Rights of Recent Developments Concerning Situations Known as Stages of Seige or Emergency*, 35 U.N.

These rights include: the right not to be subjected to arrest or detention arbitrarily, the right to equal protection, to be informed of charges, to be presumed innocent until proven guilty and the right not to receive a heavier penalty than the one that was applicable at the time the criminal offense was committed.<sup>232</sup> If Wallenberg was not released from prison after his twenty-five year sentence was completed in 1970, his ongoing imprisonment would be an excessive penalty and a violation of international law.<sup>233</sup>

In 1975, the United Nations General Assembly adopted a declaration on the protection of persons from torture and other forms of cruel and inhuman punishment.<sup>234</sup> Under the terms of the declaration, any act of torture or degrading punishment is an offense against human dignity and is a violation of the Universal Declaration.<sup>235</sup> A person who alleges that he has been subjected to such degrading treatment has the right to have his case examined by impartial state authorities.<sup>236</sup> If Raoul Wallenberg is still a prisoner of the Soviet system, his forty-five year prison term is cruel and inhuman punishment under international standards and his family and legal guardian may have recourse on his behalf under international law.<sup>237</sup>

Soviet law explicitly provides that punishment "shall have the purpose of reform and re-education of convicted persons," but "shall not have the purpose of causing physical suffering or lowering human dignity."<sup>238</sup> Sending Wallenberg from prison to prison and preventing outside contact is evidence of degrading treatment.<sup>239</sup> Soviet law specifically ensures

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ESCOR Commission on Human Rights, Subcommittee on Prevention of Discrimination and Protection of Minorities (Provisional Agenda Item 10) at 52-53, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982).

232. *Id.*

233. See *supra* notes 225-29 and accompanying text for a discussion of Wallenberg's imprisonment exceeding the maximum term allowed under Soviet law. The author assumes there has been no acceptable conclusive evidence that Wallenberg has died.

234. *Declaration on the Protection of Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

235. *Id.* art. 2.

236. *Id.* art. 8.

237. Y. Kaufman, *supra* note 21, at 22-23.

238. *Fundamental Principles of Criminal Legislation*, *supra* note 229, art. 20.

239. Reports by prisoners who returned from the Soviet Union claim to have seen Wallenberg in a number of prisons throughout the Soviet system. See generally E. LESTER, *supra* note 5, at 164-73 (giving a chronology of reports from prisoners).

Upon his arrest, Raoul Wallenberg was not permitted to contact his colleagues at the Swedish Legation in Budapest, the Foreign Office in Stockholm or his family. Y.

the rights of prisoners to communicate with others, but Wallenberg was unable to communicate with his family or his government.<sup>240</sup>

The 1936 Soviet Constitution requires that in all Soviet courts, cases must be heard in public, unless otherwise provided for by law, and an accused person is guaranteed the right to counsel.<sup>241</sup> Also relevant to the Wallenberg case is a provision in the Code of Criminal Procedure which ensures that foreign citizens in the Soviet Union shall be guaranteed the right of recourse to a court to defend personal and other rights.<sup>242</sup> The Soviet Union has produced no indication that it afforded Wallenberg a fair and open trial or adequate counsel.

The Universal Declaration and the Covenant on Civil and Political Rights clearly provide that a person who has been arrested be accorded a fair and open trial and an equitable defense.<sup>243</sup> It is not known whether Wallenberg was tried and convicted or simply sent to prison without a trial. In either case, the Soviet Union denied Wallenberg his right to an open trial that, under international agreement, should have been granted to him.

The Supreme Court of the USSR declared in the *Case of Shlafshtein, et al.*, that gross violations of criminal procedure, including the absence of defense counsel, are grounds for reversal of a criminal conviction.<sup>244</sup>

Kaufman, *supra* note 21, at 29. Wallenberg was placed in a cell by himself, and his only means of communication with other prisoners was a system of tapping on the pipes. See E. LESTER, *supra* note 5, at 165-66.

240. Fundamental Principles of Correctional Labor Legislation of the USSR and Union Republics, Ved. Verkh. Sov. SSSR, confirmed July 11, 1969, arts. 26, 62-65, compiled and translated in W. BUTLER, THE SOVIET LEGAL SYSTEM 701 (1978).

241. KONST. SSSR (1936), art. 111.

242. UPK RSFSR, reprinted in SOVIET CRIMINAL LAW, art. 37, at 216.

243. Article 10 of the Universal Declaration of Human Rights provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Universal Declaration, *supra* note 157, art. 10. Article 9 of the International Covenant on Civil and Political Rights is even more explicit:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

International Covenant, *supra* note 207, art. 9. Article 14 details explicit procedures for informing someone facing a criminal charge of the nature and causes of the charge, for trial without undue delay, for the choice of defense counsel and free interpreter, and for time to prepare his case. *Id.* art. 14.

244. Judgment of April 22, 1964, Judicial Division for Criminal Cases of the Supreme

Based on these findings and on Soviet law, Raoul Wallenberg's arrest and detention were violations of the Soviet Criminal Code, the Code of Criminal Procedure and the Fundamental Principles of Criminal Procedure. If Wallenberg was tried and convicted, he was denied the right of publicity of his trial and of the court's judgment.<sup>245</sup> If Wallenberg was sent to jail without trial, he was denied the right to a fair hearing before conviction.<sup>246</sup> If Wallenberg was sent to prison for the maximum term of twenty-five years, he should have been officially released in 1970.<sup>247</sup> Therefore, according to Soviet statutes, the procurator general has a duty to release Wallenberg immediately.<sup>248</sup>

After his arrest, Raoul Wallenberg disappeared while in Soviet custody, so now the Soviet Union has an obligation to account for his whereabouts.<sup>249</sup> In 1978, the United Nations General Assembly adopted, without a vote, a resolution calling on governments to undertake speedy and impartial investigations of disappeared persons.<sup>250</sup> The General Assembly called on all foreign states to cooperate with one another in a common effort to search for, or to locate or account for such persons who involuntarily have disappeared.<sup>251</sup> The Wallenberg case is a prime and compelling example of what the General Assembly considered when it adopted this resolution.<sup>252</sup>

International law seeks to protect the honor and dignity of every

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Court of the USSR, Kirgiz SSR, 4 BULL. VERKH. SUDA SSSR 45, reprinted in I(4) SOV. STAT. & DEC. 5.

245. Y. Kaufman, *supra* note 21, at 19.

246. *Id.*

247. Twenty-five years was the maximum prison term for serious crimes prior to 1958. See *supra* notes 225-29 and accompanying text (discussing prison terms).

248. The chief function of the procurator is to ensure strict and uniform observance of the law in all spheres of public and social life. CRIMINAL JUSTICE SYSTEM, *supra* note 194, at 16-17. The procurator general is entrusted with the highest supervisory responsibility. KONST. SSSR (1977), art. 164, at 220.

Article 11 of the Code of Criminal Procedure provides: "A procurator shall be obliged to release immediately any person illegally deprived of freedom or kept under guard for more than a term provided for by law or by a judgment of a court." UPK RSFSR, reprinted in SOVIET CRIMINAL LAW, art. 11, at 209.

249. Y. Kaufman, *supra* note 21, at 13.

250. Resolution Adopted by the United Nations General Assembly on Disappeared Persons, G.A. Res. 33/173, 33 U.N. GAOR Supp. (No. 45) at 158, U.N. Doc. A/33/45 (1978). The resolution called on governments: "In the event of reports of enforced or involuntary disappearances, to devote appropriate resources to searching for [disappeared] persons and to undertake speedy and impartial investigations." *Id.*

251. *Id.*

252. Y. Kaufman, *supra* note 21, at 13.

individual. The Soviet Union's nondisclosure of Wallenberg's whereabouts amounts to a refusal to honor its commitment to cooperate with the General Assembly resolution to investigate involuntary disappearances. The Soviet Union's continued detention of Raoul Wallenberg impugns his dignity because the Covenant on Civil and Political Rights requires all states to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human person."<sup>253</sup> Both the Universal Declaration and the Covenant on Civil and Political Rights provide that no one should be subjected to arbitrary interference with privacy, family, home or correspondence, or attacks upon his honor and reputation.<sup>254</sup> Raoul Wallenberg was denied visitors and correspondence during his incarceration; such deprivations can be considered violations of these two provisions of international law.<sup>255</sup>

International law also considers fundamental the protection and preservation of the family unit, as set forth in the Final Act of the Helsinki Accords.<sup>256</sup> These accords call on parties to facilitate requests for family reunification.<sup>257</sup> Similar concerns for the integrity of the family unit are addressed in the Universal Declaration and the Covenant on Civil and Political Rights.<sup>258</sup> The Soviet Union, as a party to these international agreements,<sup>259</sup> is obligated to release Wallenberg, particularly in light of his advanced age, or at least disclose the truth about his fate to show that the family cannot be reunited.

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253. International Covenant, *supra* note 207, art. 10, para. 1.

254. Universal Declaration, *supra* note 157, art. 12; International Covenant, *supra* note 207, art. 17.

255. See Universal Declaration, *supra* note 157, art. 12. The International Covenant of Civil and Political Rights provides that "everyone shall have the right to freedom of association with others." International Covenant, *supra* note 207, art. 22.

256. Conference on Security and Cooperation in Europe: Final Act, Helsinki, 1975, *reprinted in* DEPT. ST. BULL., Sept. 1, 1975 [hereinafter Final Act of the Helsinki Accords].

257. Section 1(b) of the Final Act of the Helsinki Accords provides: "The participating states will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family, with special attention being given to requests of an urgent character—such as requests submitted by persons who are ill or old." *Id.*

258. Universal Declaration, *supra* note 157, art. 16, para. 3; International Covenant, *supra* note 207, art. 23, para. 1.

259. For a discussion of treaties to which the Soviet Union is a party, see Note, *supra* note 169.

## VIII. THE CREATION OF AN INVESTIGATORY COMMISSION

A. *The Need for an Investigatory Body*

The United Nations General Assembly monitors gross violations of human rights around the world and seeks to stop them.<sup>260</sup> In attempting to deal with global problems, the General Assembly forms committees to examine certain "trends" or "phenomena."<sup>261</sup> Examples of this are the Working Group on Enforced or Involuntary Disappearances<sup>262</sup> and the Working Group on Detention, which is in the midst of adopting a Draft Declaration on the problem of enforced or involuntary disappearances, such as the case of Raoul Wallenberg.<sup>263</sup>

Since the Soviets have begun to recognize the need for a resolution of the Wallenberg mystery, they may now be willing to cooperate with Wallenberg's family and friends. A commission should be set up in the Soviet Union to investigate his disappearance. There have been a number of suggestions of what form this commission should take. Andrei Sakharov suggested a non-governmental group of independent investigators to verify all instances of, or reports or rumors about Wallenberg's having been seen "by various people at various times in various places."<sup>264</sup>

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260. *The Role of International Bodies in Humanitarian Law*, *supra* note 196, at 111.

261. *Id.*

262. *Id.*

263. *The Administration of Justice and the Human Rights of Detainees; Question of Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Detention*, 41 U.N. ESCOR Annex I (Agenda Item 9) at 14, U.N. Doc E/CN.4/Sub.2/1989/29/Rev.1 (1989).

The Group suggests that: (1) enforced or involuntary disappearance is a crime against humanity as a violation of provisions of the Universal Declaration and the Covenant on Civil and Political Rights; (2) the detention or abduction of any person against his will by government officials, followed by a refusal to disclose his fate, whereabouts or the fact of his detention is a violation of international law; (3) the detention and disappearance of a person inflicts suffering on the individual and his family and is an offense to human dignity; (4) each state must ensure that detained persons are released in a manner permitting independent and reliable verification that the persons have actually been released into conditions in which they can fully exercise their rights; (5) each state must ensure that anyone who alleges an enforced or involuntary disappearance has a right to complain and have that complaint investigated by an independent authority; and (6) no statutory limitation shall apply to acts of enforced or involuntary disappearance (irrespective of the date of their commission). *Id.*

264. *Sakharov Publicizes Wallenberg Prison Story*, Moscow News in English, No. 37, Sept. 10, 1989, at 6, in Foreign Broadcast Information Service [FBIS-SOV] 89-178, Sept. 15, 1989, at 24.



The investigators would question witnesses and visit the prisons and psychiatric wards in which the sightings took place and would have full authority to interview guards and inmates.<sup>265</sup>

United States Congressman Tom Lantos, who serves on the Foreign Affairs Committee, also suggests that an independent commission be empowered to examine all prison and hospital records and to question Soviet prisoners.<sup>266</sup> The Belgian Raoul Wallenberg Committee recently has proposed that the European Community discuss a resolution to "invite" the Soviet Union to allow an international commission of experts and historians to examine Soviet archives.<sup>267</sup> The Soviets themselves have agreed to a Swedish-Soviet commission to investigate the 1947 hospital report that stated Wallenberg died of a heart attack.<sup>268</sup> Wallenberg family members now feel that "one taboo after another" is being lifted from this case.<sup>269</sup>

### B. *The International Wallenberg Commission*

The most prominent commission already in existence to investigate the Wallenberg mystery is the International Commission of Inquiry Re Fate and Whereabouts of Raoul Wallenberg (the "International Wallenberg Commission").<sup>270</sup> This commission has determined that the evidence is

265. *Id.*

266. *Diplomatic Mystery May End*, San Francisco Chron., Oct. 24, 1989, at A28, col. 1. Congress has expressed a desire in Senate Congressional Resolution 60 that the United States government make an impartial investigation of all alleged sightings of Wallenberg. *Committee Action June 7*, Daily Report for Executives, June 8, 1990, at F-2. The resolution also calls on the Soviet Union to release Wallenberg's prison records and account for his whereabouts. *Bills & Resolutions Reported June 7*, Daily Report for Executives, June 11, 1990, at F-3.

267. Letter from Nina Lagergren and Sonja Sonnenfeld to Kay King, May 16, 1990 (quoting from an article in Svenska Dagbladet) (obtained from the office of Congressman Tom Lantos, Washington, D.C.).

268. *Id.* The suggestion was made by Swedish historian Hans Vilnius, who finds the Smoltsov report "so clumsy made [sic], that it must be genuine." *Id.*

Swedish officials are not hopeful that this investigation will end the Wallenberg mystery because even if the doctor actually did write the letter, it is not conclusive evidence that Wallenberg died. Mikkelsen, *Swedish-Soviet Joint Team to Probe Claim of Wallenberg's Death*, Reuters, May 12, 1990. Wallenberg's family members believe, however, that this joint effort is a sign of Soviet goodwill. *Id.*

269. *Id.*

270. The International Wallenberg Commission was formed in 1989 in response to current changes in the Soviet Union including a new respect for human rights. Matas interview, *supra* note 195. The commission was formed at a time when the Soviet Union began to be more responsive to inquiries and more accessible to outsiders. *Id.*

"incontrovertible" that Wallenberg did not die in 1947 as the Soviets claimed he did, but rather the evidence is "credible" that Wallenberg has been seen alive as late as the 1980s.<sup>271</sup> The International Wallenberg Commission visited the Soviet Union in the summer of 1990 in an effort to establish Wallenberg's fate.<sup>272</sup> Its conclusions that Wallenberg may very likely still be alive are based on this expedition.

The summer of 1990 trip to the Soviet Union by the International Wallenberg Commission was unique in that the Soviets, for the first time in the forty-five years since Wallenberg's disappearance, have agreed to cooperate fully with the commission in an open-ended inquiry.<sup>273</sup> So far, this cooperation has consisted of presenting certain of Wallenberg's personal effects to his family and opening the Lubianka prison and its archives to the investigators.<sup>274</sup>

The International Wallenberg Commission, however, believes that given the preponderance of evidence that Wallenberg may, still be alive, based especially on earlier sightings of Wallenberg in the late 1940s and early 1950s,<sup>275</sup> the burden of proof is on the Soviet Union to meet and

The Commission consists of experts from several countries, including the Soviet Union, in the fields of law, science, politics, academia and other humanities. Eisenthal, *Wallenberg May Be Alive, Probers Say*, JEWISH WK., Oct. 12, 1990, at 20, col. 1. Commission members include Wallenberg's half-brother, physicist Guy von Dardel of Sweden; biochemistry Professor Marvin Makinen of the University of Chicago, an American who was once a political prisoner in Vladimir prison in the Soviet Union; and Professor Irwin Cotler, a law professor and human rights activist at Montreal's McGill University. *Id.*

271. I. COTLER, *supra* note 2, at 3. The "credible" evidence that Wallenberg was still alive in the 1970s and 1980s is anchored in the testimony of several eyewitnesses, including Jan Kaplan, *see supra* notes 66-68 and accompanying text; Joseph Terelja, who spent time in Korpus II prison hospital block in Vladimir in 1970; Elena Nikolajevna Butova, a Vladimir prison doctor who examined Wallenberg in Vladimir prison around 1980; and most importantly, anonymous sources within the Soviet Union who have reported to both the Wallenberg family and Professor Irwin Cotler of the whereabouts of Wallenberg. *Id.* at 4.

272. Eisenthal, *supra* note 270, at 20.

273. *Id.*

274. *See* Keller, *supra* note 78, at A2, col. 3.

275. Some of this early evidence, as outlined in the International Wallenberg Commission Report, includes:

July 17, 1947 Date Soviets claim that Raoul Wallenberg died of a heart attack at age 35. . . .

July 27, 1947 All prisoners who had shared a cell with Wallenberg were questioned by the NKVD, asked with whom they had talked about Wallenberg, and then placed in solitary confinement for a year or more. All were warned never to speak to Wallenberg again.

November-December 1947 Roland Gottlieb, consul at the German Embassy

rebut this evidence.<sup>276</sup> This burden would be met by the Soviet government's initiating an internal investigation. If the time really has arrived for the Soviets to accept responsibility for past crimes and abandon Marxist ideology in favor of a traditional view of law, then the Soviet government will take charge and resolve the Wallenberg mystery in an acceptable fashion.

## IX. CONCLUSION

Is Raoul Wallenberg still alive today? Perhaps. Certainly continued Western interest in the case, along with the desire of President Gorbachev for democracy and human rights in the Soviet Union, should prompt the Soviet Union, thirty-five years after the diplomat's disappearance, finally to produce for the world the long-kept secrets about Wallenberg, or the man himself. His disappearance is now called a "tragic mistake" by Soviet officials.<sup>277</sup> The mistake can and should be rectified without further delay.

*Rochelle S. Berliner*

in Sofia, was captured by the Soviets in 1944, and taken to Lefortovo Prison. At the end of 1947 a co-prisoner advised Gottlieb that Raoul Wallenberg was in the Lefortovo Prison.

**December 1947** Andrei Shimkevitch, a Soviet prisoner from 1930 to 1957 and a stepson of sculptor Jacques Lipchitz, told the Raoul Wallenberg Hearing in Stockholm in 1980 of being in a cell with Raoul Wallenberg in December 1947. Raoul Wallenberg informed him that he was a diplomat who had been imprisoned on charges of spying.

**Summer 1948** Dr. Menachem Melzer, an Austrian born doctor, . . . worked as a [d]octor in the [n]orthern part of Ural. In [the] summer of 1948 he came to the labour camp of Chalmer-Ju, where he examined Raoul Wallenberg.

**August 1954** In the Corpus II hospital block of Vladimir Prison, a Swiss prisoner named Emil Brugger "talked" by tapping code on his cell wall with a prisoner in the neighboring wall who said he was Wallenberg. The Swede in the next cell had identified himself as "Wallenberg, First Secretary Swedish Legation, Budapest 1945." He asked Brugger to contact any Swedish embassy or consulate and report his information if he ever was released.

I. COTLER, *supra* note 2, app. D, at 1-2. The evidence cited in this report continues descriptively through the 1950s, 1960s and 1970s of various individuals' sightings and contacts with Wallenberg. *Id.* at 1-9.

276. *Id.* at 4.

277. Symon, *Family Sure Wallenberg Still Alive in '80's*, Daily Telegraph (London), Oct. 17, 1989, at 11, col. 1. Soviet Foreign Ministry spokesman Gennady Gerasimov said Wallenberg's arrest had been a "tragic mistake" and that Wallenberg "was caught up in a maelstrom of repression." *Id.*