THE SOVIET UNION AND HUMAN RIGHTS LEGISLATION: THE SHCHARANSKY CASE*

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The international legal protection of human rights has developed considerably since the promulgation of the Charter of the United Nations and, more especially, the 1948 Universal Declaration of Human Rights.

Several international conventions for the protection of human rights have been drawn up — one of the most important of which is the International Covenant on Civil and Political Rights of December 19, 1966 (hereinafter referred to as: Covenant). The Covenant was ratified by the Soviet Union and entered into force on March 23, 1976.[1] Another important document in this field is the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe (hereinafter referred to as: Helsinki Final Act), to which the Soviet Union is a signatory. It was also in the 1970's that a Soviet Mathematical Engineer, Anatoly Shcharansky, embarked upon a course of action which eventually put him in conflict with the Soviet state apparatus; a conflict which has been painted in different lights by different people.

Shcharansky (who was born in 1949) submitted his first application for an exit visa to emigrate to Israel in 1973. The refusal of the responsible Soviet authorities (in this case *OVIR*, the Depart-

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* This article is based on a memorandum prepared for the Emergency Conference on Shcharansky which was held in the Amsterdam Hilton Hotel on May 12 and 13, 1980. The Conference was heard by a panel of distinguished citizens from several countries: Lord Avebury (London), Ramsey Clark (New York), Robert F. Drinan (Washington, D.C.), George Fernandes (New Delhi), Charles Hanin (Brussels), Michel Rocard (Paris), Bayard Rustin (New York), Mario Soares (Lisbon), Joop den Uyl (The Hague), and Andrew Young (Washington, D.C.). In preparing the present article, use has been made of the testimony delivered at this Conference.

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1. *See* the Act of Ratification *in* VEDOMOSTI VERKHOVNOGO SOVETA SSSR NO. 17, ITEM 291 (1976) [THE OFFICIAL GAZETTE OF THE SUPREME SOVIET OF THE USSR] [hereinafter cited as SUPREME SOVIET GAZETTE].

ment of Visas and Registration) to grant Shcharansky's repeated requests for an exit visa turned Shcharansky into a "refusenik" — a term that had come to signify those Soviet citizens who have been refused the necessary permission to emigrate from the Soviet Union to a country of their choice. As a result of his professed desire to emigrate, Shcharansky was fired from his job at the All-Union Research Institute on Petroleum and Gas and began giving private lessons in order to support himself and to avoid prosecution under Soviet anti-parasite laws. When his requests for an exit visa were continually refused, Shcharansky became a member of the Jewish emigration movement and of the unofficial Public Group to Promote the Observance of the Helsinki Accords. Despite the letter and spirit of the international human rights accords to which the Soviet Union was a party, and the subsequent incorporation of some of these basic provisions in the Soviet Constitution of 1977, Shcharansky was not only refused an exit visa, he eventually became the subject of surveillance by Soviet security organs and was arrested in March, 1977.

In a trial held in Moscow from July 10-14, 1978, Shcharansky was found guilty of treason in the form of espionage and of rendering assistance to a foreign state in carrying on hostile activities against the Soviet Union (Art. 64(a), RSFSR Criminal Code) and of anti-Soviet propaganda and agitation (Art. 70 (para. 1), RSFSR Criminal Code). Pursuant to a verdict of the Criminal Chamber of the RSFSR Supreme Court, he was sentenced to deprivation of freedom for a term of three years in prison, with an additional ten years to be served thereafter in a labor colony of strict regime.

The transcript of the trial, the verdict, and the grounds for the judgment have not been published. Shcharansky's brother Leonid, who attended the trial (except the closed sessions) was able to make notes, and his report has become available outside the Soviet Union. Moreover, the Moscow underground *samizdat* periodical *Chronicle of Current Events*[2] contains a report of the trial, clearly constructed on the basis of Leonid Shcharansky's notes. Reports on the trial appeared in the Soviet media, and briefings were held twice daily during the trial by a spokesman of the court.

This article considers the Shcharansky case from the points of view of Soviet and international law, insofar as the latter has not

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2. 50 CHRONICLE OF CURRENT EVENTS 42-69 (1979). *See also* D. JACOBY, L. PETTITI & R. RAPPAPORT, L'AFFAIRE CHTCHARANSKY PROCÈS SANS DÉFENSE (1978) [hereinafter cited as L'AFFAIRE CHTCHARANSKY]; A. SHCHARANSKY, NEXT YEAR IN JERUSALEM (1979).

been incorporated into the domestic law of the Soviet Union. Use will be made of court practice and legal literature published in the Soviet Union in order to clarify the questions of whether the trial was conducted in accordance with the relevant procedural rules of Soviet law and whether the guilt of the accused was established by the court as a result of a thorough, complete, and objective evaluation of the evidence (Art. 20, RSFSR Code of Criminal Procedure).

In addition, Soviet law will be examined in the light of conventions, treaties, and other international legal documents in the field of human rights to which the Soviet Union is a party. Although this controversy has evoked much emotion from many people, it is the intent of the authors of this article to present the legal issues involved in as objective and factual a manner as is possible.

I. THE USE OF INTERNATIONAL NORMS AND OBLIGATIONS FOR AN EVALUATION OF SOVIET LAW AND PRACTICE

According to Soviet doctrine, citizens of the Soviet Union (and other individuals residing within its territory) enjoy only those civil and political rights which have been granted by the law of the state.[3] Whether an individual has any rights guaranteed by a treaty or a norm of international law must be considered in light of the Soviet concept of the relationship between international law and domestic law.[4]

Nearly all Soviet authors are of the opinion that international treaties concluded by the Soviet Union are binding on the Soviet Union as a state in international law.[5] Through promulgation within the Soviet Union, the treaty is transformed into domestic law.[6] However, not all treaties contain rules and norms. Only

3. KURS MEZHDUNARODNOGO PRAVA V SHESTI TOMAKH. Tom I. PONIATIE I SUSHCHOST' SOVREMENNOGO MEZHDUNARODNOGO PRAVA 161, 207 (V.M. Chkhikvadze ed. 1967); [A COURSE IN INTERNATIONAL LAW IN SIX VOLUMES. VOL I. THE MEANING AND ESSENCE OF CONTEMPORARY INTERNATIONAL LAW]; *See also* THE SOVIET CODES OF LAW XXXV (W.B. Simons ed. 1980) [hereinafter cited as THE SOVIET CODES OF LAW] in 23 LAW IN EASTERN EUROPE (F.J.M Feldbrugge ed. 1973).

4. *Id.*; J.J. Uibopuu, *The International Legal Obligations of the USSR for the Protection of Individuals*, 14 CO-EXISTENCE No. 2 (1977).

5. A.N. TALALAEV, PRAVO MEZHDUNARODNYKH DOGOVOROV: OBSHCHIE VOPROSY 142 (1980); J.F. Triska, *Treaties*, in ENCYCLOPEDIA OF SOVIET LAW 689, 692 (F.J.M. Feldbrugge ed. 1973).

6. *Id.* at 692; R.A. Miullerson, *Natsional'no-pravovaia implementatsiia mezhdunarodnykh dogovorov v SSSR*, 5 VESTNIK MOSKOVSKOGO UNIVERSITETA (1978) [*The National-Legal Implementation of International Treaties in the USSR*, MOSCOW UNIVERSITY HERALD]; E.T. Usenko, *Teoreticheskie problemy sootnosheniia mezhdunarodnogo i vnutrigosudarstvennogo prava*, SOVETSKII EZHEGODNIK MEZHDUNARODNOGO PRAVA 57-90

those treaties or clauses therein which can be deemed self-executing will create rules binding upon Soviet citizens.[7] Soviet jurists are of the opinion that the question of whether an international rule has such a character is decided by the state itself.[8]

> This regards especially international treaties in which states with different social systems are a party when the . . . provisions of the treaty have to be formally adapted not only to the legal system of the country, but also in essence to its socio-economic and political system.[9]

In the field of human rights treaties, Soviet jurists are reluctant to argue that such treaties are self-executing.[10] The Soviet jurist Kartashkin has written that:

> a specific feature of international agreements in the field of human rights is that it is not sufficient to declare an agreement a part of the domestic law of the state to put them into practice. Many articles of international agreements do not possess in themselves so-called 'self-executing force.' The only way to secure their execution is to issue corresponding legislative acts.[11]

Another Soviet jurist, Kulikov, has stated that the Covenant provides only for a gradual realization of the proclaimed rights and freedoms.[12]

[1977] [*Theoretical Problems of the Realtionship Between International and Domestic State Law*, SOVIET YEARBOOK OF INTERNATIONAL LAW]; G.I. Tunkin & R.A. Miullerson, *Zakon o mezhdunarodnykh dogovorakh SSSR*, 2 SOVETSKOE GOSUDARSTVO I PRAVO 28-29 [*The Law Concerning USSR International Treaties*, SOVIET STATE AND LAW]; E.M. Ametistov, *Mezhdunarodnyi dogovor i sovetskii zakon*, PROBLEMY SOVERSHENSTOVOVANIIA SOVETSKOGO ZAKONODATEL'STVA (1979) [*The International Treaty and Soviet Law*, PROBLEMS OF THE IMPROVEMENT OF SOVIET LEGISLATION]. Some Soviet authors do not agree with this opinion: N.V. MIRONOV, SOVETSKOE ZAKONODATEL'STVO I MEZHDUNARODNOE PRAVO 37 (1968) [SOVIET LEGISLATION AND INTERNATIONAL LAW]; D.B. LEVIN, AKTUAL'NYE PROBLEMY TEORII MEZHDUNARODNOGO PRAVA 251 (1974) [CURRENT PROBLEMS OF THE THEORY OF INTERNATIONAL LAW]. Several authors disagree with the term "transformation" and rather call it "giving domestic legal force to treaty norms", *see e.g.* TALALAEV, *supra* note 5, at 164. *See also* H.J. Uibopuu, *International Law and Municipal Law in Soviet Doctrine and Practice*, *reprinted in* IUS HUMANITAS, FESTSCHRIFT ZUM 90 GEBURTSTAG VON ALRED VERDROSS 661-688 (1980) [IUS HUMANITAS FESTSCHRIFT COMMEMORATING ALFRED VERDROSS' 90TH BIRTHDAY].

7. *Id.* However, some authors deny that international treaties may create legal norms upon ratification, TALALAEV, *supra* note 5, at 165.

8. Usenko, *supra* note 6, at 72-73.

9. *Id.*

10. *See* G.I. TUNKIN, TEORIIA MEZHDUNARODNOGO PRAVA 93 (1970) [THEORY OF INTERNATIONAL LAW]; and Uibopuu, *supra* note 6, at 685.

11. V.A. KARTASHKIN, MEZHDUNARODNAIA ZASHCHITA PRAV CHELOVEKA (OSNOVNYE PROBLEMY SOTRUDNICHESTVA GOSUDARSTV) 52 (1976) [INTERNATIONAL PROTECTION OF HUMAN RIGHTS (BASIC PROBLEMS OF STATE COOPERATION)].

12. R. KULIKOV, O MEZHDUNARODNO-PRAVOVOI OTVETSTVENNOSTI ZA NARUSHENIE

Consequently, under Soviet legal theory, the International Covenant on Civil and Political Rights does not automatically form a part of the domestic law of the Soviet Union. Shevtsov wrote in 1979 that "the covenants on human rights do not confer rights on individuals but [rather] establish mutual obligations of states in granting such rights to individuals."[13]

However, the Soviet Union is bound by the Covenant as a state, and therefore it is obliged "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind. . . ."[14] It has, under the Covenant and also under its own legislation, the duty to take the necessary steps "to adopt such legislation or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[15]

Moreover, in the Helsinki Final Act the Soviet Union obligated itself in the field of human rights and fundamental freedoms to act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. It has also bound itself to fulfill its "obligations as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights."[16]

II. THE BASIC ISSUE IN THE SHCHARANSKY CASE: THE RIGHT TO EMIGRATE

A. National Law

Does Soviet law afford its citizens and other individuals resid-

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PRAV CHELOVEKA 18 (1979) [ON INTERNATIONAL LEGAL RESPONSIBLITY FOR HUMAN RIGHT VIOLATIONS]. He uses as an argument the points of view laid down in: Problems Arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, Report of the Committee of Experts on Human Rights to the Committee of Ministers of the Council of Europe, 13-14 (1970).

13. V. SHEVTSOV, CITIZENSHIP IN THE USSR (A LEGAL STUDY) 57 (1979) [hereinafter cited as CITIZENSHIP IN THE USSR].

14. Art. 2 of the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, U.N. Doc. A/PV.1496 [hereinafter cited as Civil and Political Covenant].

15. *Id.*; Law of the Procedure for the Conclusion, Execution, and Denunciation of International Agreements of the USSR of July 6, 1978, arts. 19-24, SUPREME SOVIET GAZETTE, *supra* note 1, No. 28, ITEM 439 (1978), *translated in* V-I COLLECTED LEGISLATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND CONSTITUENT UNION REPUBLICS 1-13 (W.E. Butler ed. 1979) [hereinafter cited as Butler].

16. Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975 § VII, ¶ I.a. [hereinafter cited as The Helsinki Final Act].

ing within its territory the right to leave the country and especially the right to emigrate for permanent residence to another country? Under the RSFSR Civil Code, citizens may choose their place of residence "in conformity with the law."[17] According to a Soviet court, this does not grant the right to choose a place of residence in a foreign country.[18]

The procedural rules that have been enacted in the Soviet Union seem to imply that emigration is possible only after the renunciation of Soviet citizenship. According to Article 6 of the Statute on Entry Into and Exit From the Soviet Union, "[the] departure from the USSR of foreign citizens and persons without citizenship is allowed on the basis of a valid foreign passport or of documents which replace them, if the individual has an exit visum."[19] This rule seems to be applied especially in cases of Jews wanting to emigrate to Israel, which is of special importance in this case since Shcharansky had indicated a desire to emigrate to Israel. Therefore, the first question is whether a citizen has the right to renounce his citizenship. Prior to enactment of the Law on Soviet Citizenship of December 1, 1978 (which entered into force on July 1, 1979[20]), Soviet law did not contain a clear rule to this effect. But the 1978 law now states that the renunciation of Soviet citizenship must be sanctioned by the Presidium of the Supreme Soviet. It may be refused only,

> if the applicant has not fulfilled his (her) obligations to the state or his (her) property commitments connected with the substantive interests either of citizens or of state, cooperative, or other social organizations. Renunciation of USSR citizenship shall not be sanctioned if the applicant is under indictment or if there is a court judgment against him (her) liable to enforcement, or if the person's renunciation of USSR citizenship is counter to the interests of the national security of the USSR.[21]

The decision of the Presidium of the Supreme Soviet to refuse such

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17. Art. 10 of the RSFSR Civil Code of 1964, *translated in* THE SOVIET CODES OF LAW, *supra* note 3, at 396.

18. The case is reported in V. CHALIDZE, PRAVA CHELOVEKA I SOVETSKII SOIUZ 109 (1974) [HUMAN RIGHTS AND THE SOVIET UNION].

19. Decree of the USSR Council of Ministers of September 22, 1970, SOBRANIE POSTANOVLENII PRAVITEL'STVA SSSR NO. 18, ITEM 139 (1970) [COLLECTION OF DECREES OF THE GOVERNMENT OF THE USSR] *translated in* Butler, *supra* note 15, at 2-6.

20. Law on USSR Citizenship of Dec. 1, 1978 SUPREME SOVIET GAZETTE, *supra* note 1, No. 49 ITEM 816 (1978), *translated in* 5 REVIEW OF SOCIALIST LAW No. 4 at 463-467 (1979).

21. *Id.* art. 17, LAW ON USSR CITIZENSHIP.

a renunciation is not subject to appeal.[22] Therefore, a citizen does not have an enforcable right of renunciation of Soviet citizenship.

Once an application to renounce citizenship has been approved, the individual then needs an exit visum (though in practice the procedures seem to work concurrently).[23] Under the Statute on Entry Into and Exit From the Soviet Union, an exit visum is granted by the Soviet Ministry of Internal Affairs and its subordinate agencies "in the established procedure."[24] In recent years, the Local Departments of Visas and Registration seem to have the power to decide this question. The above-mentioned statute and other Soviet laws fail to shed any light on the practical details of how individuals seeking an exist visa can initiate and pursue their quest, nor do they describe the substantive criteria used to guide state agencies in deciding whether to approve or reject such applications.[25]

From accounts in the *samizdat* press,[26] it becomes clear that a number of bureaucratic obstacles make it difficult to gather the necessary documents which have to be handed over to the competent authorities. The necessary documents include those from the employer or an institution with which the petitioner is affiliated, and from family members (for example, parents or a former spouse), plus an invitation from a member of the petitioner's family living abroad. The requirement of such documents makes emigration wholly dependent upon the cooperation of others.[27]

When the necessary documents are collected and handed over to the authorities (who are often available only for a few hours every week and do not always accept the documents), permission to emigrate can still be refused on a number of other grounds, such as state security, military service, financial claims of family members, suspicion of a crime, a non-executed judgment, and other state interests.[28] The exit visum may also be refused on account of a fam-

22. Though this is not explicitly mentioned in Soviet law, it follows from the distribution of work between the Supreme Soviet and the Soviet courts.

23. G. Ginsburgs, *Current Legal Problems of Jewish Emigration from the USSR*, 6 SOVIET JEWISH AFFAIRS No. 2 (1976).

24. Decree of the USSR Council of Ministers, *supra* note 19, art. 7.

25. Ginsburgs, *supra* note 23; *see also* H.G. SHARLET, THE SOVIET TREATMENT OF JEWS 69 (1974).

26. Numerous accounts may be found in SBORNIK DOKUMENTOV IZ ARKHIVA SAMIZDATA [COLLECTION OF DOCUMENTS FROM THE SAMIZDAI ARCHIVES].

27. Ginsburgs, *supra* note 23.

28. Law on USSR Citizenship, *supra* note 20, art. 17. According to Soviet authorities, these grounds are fully in harmony with the International Covenant on Civil and Political

ily relationship which is deemed to be too loose. Frequently, the refusal is only given orally, and sometimes the reasons are not communicated at all or are extremely vague. There is no way to appeal a refusal, though the person refused may renew his request every six months.[29]

Nevertheless, the generally accepted figures indicate that during the past ten years a considerable number of Jews have left the Soviet Union.[30] During the 1970's it has been estimated that over 600,000 invitations have been sent from Israel alone in reply to requests from Jews who wish to leave the Soviet Union.

This inconsistency and the ambivalence of Soviet policy towards the question of Jewish emigration to Israel seems understandable. As one observer has explained:

> a dissatisfied small minority, eager to leave, can be a disturbing factor in a nation's body politic so that from this point of view their departure should be welcome. But on the other hand, if large numbers of Jews were to leave, the world might believe 'Zionist' charges of unbearable discrimination and might therefore question the validity of Soviet proclamations of the equality of all people under socialism; the USSR might lose invaluable scientists and technicians in whose education much has been invested (some of them might even have had access to classified information and thus pose a security problem); and Israel's armed forces might be greatly strengthened, to the detriment of the Soviet Union's Arab allies.[31]

On the other hand, Soviet politicans have frequently declared that they will allow Soviet citizens to emigrate. As Brezhnev stated in 1973, the year Shcharansky made his first application to emigrate to the West and received his first refusal, "[the] Soviet Union has no law restricting the emigration of its citizens if that departure is

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Rights, V. SHEVTSOV, GRAZHDANSTVO SSSR. BESEDY O KONSTITUTSII SSSR 60 (1980) [USSR CITIZENSHIP CONVERSATIONS ON THE CONSTITUTION OF THE USSR].

29. The law does not provide for such an appeal.

30. The number of Jews who have emigrated from the USSR:

Year	Number	Year	Number
1961-1967	5,400	1975	18,700
1968-1969	2,500	1976	14,200
1970	1,000	1977	16,700
1971	13,000	1978	28,900
1972	32,400	1979	51,000
1973	36,400	1980	21,500
1974	24,200		

SHARLET, *supra* note 25, at 68; testimony of Michael Sherbourne at the Emergency Conference on Shcharansky; *See also*, The Times (London), January 22, 1981, at 6, col. 3.

31. SHARLET, *supra* note 25, at 61.

justified, though it puts limits on certain categories of people connected with what is called national security."[32]

B. International Law

The freedom to leave one's own country has been mentioned in the Universal Declaration of Human Rights of 1948 (Art. 13); it has also been elaborated in the International Covenant on the Elimination of All Forms of Racial Discrimination of 1965 (Art. 5 (d)) and especially in the International Covenant on Civil and Political Rights of 1966, the pertinent Article of which reads:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.[33]

According to Article 29 of the 1978 Law on Soviet Citizenship, the rules of international treaties to which the Soviet Union is a party prevail over the rules established in the law if, under the provisions of the treaty, rules have been established other than those contained in the law. According to Soviet authors, however, the International Covenants are not treaties in this sense.[34] The Final Act of Helsinki — in its chapter on Co-operation in Humanitarian and Other Fields — proceeds not from the right to leave one's country, but from humanitarian considerations. In this respect, special attention is given to the reunification of families.

> 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.
>
> They will deal with applications in this field as expeditiously as possible.
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> They will lower where necessary the fees charged in connec-

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32. *Id.*, at 63.
33. *Supra* note 1.
34. SHEVTSOV, *supra* note 13, at 57.

tion with these applications to ensure that they are at a moderate level.

Applications for the purpose of family reunification which are not granted may be renewed at the appropriate level and will be reconsidered at reasonably short intervals by the authorities of the country of residence or destination, whichever is concerned; under such circumstances fees will be charged only when applications are granted.

Until members of the same family are reunited, meetings and contacts between them may take place in accordance with the modalities for contacts on the basis of family ties.

They confirm that the presentation of an application concerning family reunification will not modify the rights and obligations of the applicant or of members of his family.[35]

Helsinki has had some impact upon the right to emigrate to countries participating in the Helsinki Conference. According to an American specialist on Soviet law, Professor George Ginsburgs:

> Reports reaching the outside world in January 1976, noted several steps instituted around the turn of the year which eased to a degree the complex emigration procedures enforced until then. For instance, a reduction of the exit visa fee from 400 to 300 rubles was verified by a number of applicants. However, emigrants to Israel were still expected to pay 500 additional rubles to renounce their Soviet citizenship, which Moscow allegedly insisted on because it did not maintain diplomatic relations with Israel.
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> A further change in the rules provided that upon subsequent denial of issuance of a general foreign passport the tax paid had to be reimbursed in full, which apparently referred to the 40 ruble fee which previously had to accompany each fresh application, no matter how often an individual had his petition rejected and filed anew. Emigrants of Jewish origin were probably not affected by this clause in any event since, as stateless persons following the mandatory surrender of their Soviet citizenship, they travelled abroad on the strength not of a regular foreign passport but of a special substitute travel certificate.[36]

Recently, the rules with regard to the fees have again been changed. According to the Decree of the Soviet Union Council of Ministers of June 29, 1979, the following fee structure is now in force:

1. for the issue of an exit visa to a USSR citizen or a stateless

35. The Helsinki Final Act, *supra* note 16, § b, ¶ 1.

36. Ginsburgs, *supra* note 23.

person, who wants to travel to: — a socialist country, 30 rubles, — any other country, 200 rubles;

2. for an exit visa, together with an application for the renunicia-tion of USSR citizenship, for individuals living in the USSR and who desire to emigrate from the USSR to: — a socialist country, 50 rubles, — any other country, 500 rubles.[37]

The Decree contains no provision for fee refunds upon refusal of an individual petition.[38] As compared with prior regulations, the Decree has lowered the total fees by 100 rubles. However, the total costs of fees for emigration to a non-socialist country remain high (about 4 times an average Soviet worker's monthly salary).[39] As was the case under the former regulations, the discriminatory aspect of the regulation lies in its application. Individuals who want to emigrate to Israel must also renounce their citizenship, while this does not seem to be required in all cases when emigration to other countries is requested.[40]

In conformity with the Helsinki Final Act, fees for the issuance of an exit visa are charged only when the application is granted. However, this rule does not apply to the renunciation of Soviet citizenship, and this runs counter to the spirit, if not to the letter, of the Helsinki Final Act.[41]

From a legal standpoint, one could argue that in theory the Soviet restrictions on the right to emigrate do not themselves transgress the provisions of the International Covenant on Civil and Political Rights.[42] In practice, however, the bureaucratic hindrances, the absence of effective remedies, and the arbitrary nature of a decision concerning an application to emigrate, means that the Soviet Union does not follow a policy which ensures *all* individuals within its territory and subject to its jurisdiction the right to leave

37. SOBRANIE POSTANOVLENII PRAVITEL'STVA SSSR NO. 20, ITEM 122 (1979) [COLLECTION OF DECREES OF THE GOVERNMENT OF THE USSR]; 6 BIULLETEN' VERKHOVNOGO SUDA SSSR (1979) [BULLETIN OF THE SUPREME COURT OF THE USSR].

38. However, instructions of the USSR Ministry of Finance may provide for this, Decree of the Presidium of the USSR Supreme Soviet of June 29, 1979 art. 6, SOVIET SUPREME GAZETTE, *supra* note 1, No. 28, ITEM 477 (1979).

39. The average monthly salary of all employed persons in the USSR in 1979 was 163.3 rubles, NARODNOE KHOZIAISTVO SSSR V 1979 G. STATISTICHESKII SBORNIK 394 (1980) [THE NATIONAL ECONOMY OF THE USSR FOR 1979 STATISTICAL HANDBOOK].

40. Ginsburgs, *supra* note 23.

41. The Helsinki Final Act refers to all fees in general, *see* The Helsinki Final Act, *supra* note 16, § 6, ¶ 1.

42. This point was made in the Soviet Union during the parliamentary debates on this law, *cf.* IZVESTIIA December 2, 1978.

their country (Art. 2 of the Covenant). The case of Shcharansky is only one example of the arbitrariness of Soviet authorities on this question.[43]

III. THE SHCHARANSKY TRIAL: PROCEDURAL ASPECTS

A. Custody

Under Soviet law and contrary to Article 9, section 4, of the International Covenant on Civil and Political Rights, a person held in pre-trial custody is not entitled to take proceedings before a court for the court to adjudicate the legality of the detention.[44] The resulting arbitrariness of this situation is clearly demonstrated in the case of Shcharansky and in other cases.[45]

Pre-trial custody is permitted under Soviet law for the crimes of which Shcharansky was accused (Art. 96, RSFSR Code of Criminal Procedure), but may not exceed 9 months in total (Art. 97). Notwithstanding this rule, Shcharansky's confinement during the pre-trial investigation was initially extended another 6 months. According to an assistant to the Soviet Procurator General, who discussed matters with some *refuseniks*,[46] this was effected through the issuance of a special Edict of the Presidium of the Supreme Soviet.[47] However, under the Soviet Constitution, the Presidium of the Supreme Soviet is not empowered to deviate in a specific case from the laws in force. It may only interpret them or amend them. Moreover, such deviation from the law in force appears to be in direct conflict with Article 54 of the 1977 Soviet Constitution which guarantees the inviolability of the person.

After the lapse of these six additional months, Shcharansky was not released from custody as was legally required under the RSFSR Code of Criminal Procedure.[48] He was held in custody for

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43. *See* The Petition to the Procurator-General of the USSR from Avital Shcharansky, on Behalf of Herself and Her Husband, Anatoly Shcharansky, by her Attorney-Professor Irwin Cotler 14-15 (1978) [hereinafter cited as The Petition].

44. The RSFSR Civil Code, art. 447, provides for a claim for damage caused in these cases only if this is "specially provided by statute" but such a statute has not yet been enacted (February 1981).

45. *See* 4 A CHRONICLE OF HUMAN RIGHTS IN THE USSR 35-36 (1973).

46. The English term used to denote persons whose exit visa has been *refused*. The Russian term is *otkaznik*.

47. The Petition, *supra* note 43, app. XXXVI, being the transcript of a telephone call between Dina Beilina and Michael Sherbourne held on January 18, 1978.

48. Art. 97 of the RSFSR Code of Criminal Procedure, *translated in* THE SOVIET CODES OF LAW, *supra* note 3, at 192-193.

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another month until the trial started.

B. The Publicity of the Trial

One of the fundamental provisions of Soviet law is that the "examination of cases in all courts is open" (Art. 157, 1977 USSR Constitution). According to the exceptions made to this general rule, which are listed in Article 18 of the RSFSR Code of Criminal Procedure, only that part of the examination of Shcharansky which was concerned with state secrets could legally have been held in a closed session. In fact, only Shcharansky's brother Leonid was admitted to the open sessions of the examination and all other close relatives, friends, and journalists were not allowed to enter the court room. This practice has previously been applied to the Soviet Union in political cases for some years.[49]

C. Witnesses for the Defense

Under Article 14, section 3, of the International Covenant on Civil and Political Rights, an accused is entitled "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Under Article 276 of the RSFSR Code of Criminal Procedure, the decision to hear witnesses on behalf of the accused is completely in the hands of the court.[50] Before and during the trial, all requests by Shcharansky to summon witnesses on his behalf were refused.

D. The Right to Defense

The court session commenced with the question of the selec-

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49. AMNESTY INTERNATIONAL PUBLICATIONS, PRISONERS OF CONSCIENCE IN THE USSR: THEIR TREATMENT AND CONDITIONS 76 (2d ed. 1980) [hereinafter cited as PRISONERS OF CONSCIENCE]. According to Irwin Cotler, the trial took place in a so-called "special court" (*spetssud*), *see* The Petition, *supra* note 43, at 45; however, he does not give further evidence on this. See for the existence and activities of special courts: 43 KHRONIKA TEKUSHCHIKH SOBYTII 94 (1976) [CHRONICLE OF CURRENT EVENTS]; Yu. Luryi, *The Right to Counsel in Ordinary Criminal Cases in the USSR*, I SOVIET LAW AFTER STALIN, THE CITIZEN AND THE STATE IN CONTEMPORARY SOVIET LAW (D.D. Barry, G. Ginsburg & P.B. Maggs eds. 1977) in, 20 LAW IN EASTERN EUROPE 407 (F.J.M. Feldbrugge ed. 1977); The Public Group to Promote the Observance of the Helsinki Accords in the USSR DOC. No. 75 (1979); *O spetssudakh*, ARKHIV SAMIZDATA No. 3521 (1979) [ARCHIVES OF SAMIZDATA]; G.P. VAN DEN BERG, SOVIET COURT STATISTICS. According to Soviet textbooks, special courts did not exist in 1976, V.M. SEMENOV, SUD I PRAVOSUDIE V SSSR 162 (1976) [COURT AND JUSTICE IN THE USSR].

50. *Supra* note 48.

tion of a defense attorney. Does an accused have the right to a defense counsel of his own choosing under Soviet law?

According to the Chairman of the Court, Judge P.P. Lukanov, Shcharansky's mother, Miss Ida Milgrom had enough time to provide the accused with an advocate but had not chosen one. Without going into detail, the chairman continued that the court had assigned an advocate, S. Dubrovskaia, as defense counsel, but that the accused had refused her services. As the procurator (public prosecuting attorney) did not object to the self-defense of the accused, the court (its chairman) dismissed Dubrovskaia.

According to Article 158 of the 1977 Soviet Constitution, an accused is ensured the right of defense. Moreover, on the basis of Article 19 of the RSFSR Code of Criminal Procedure, the court is under the obligation to secure the accused with the possibility of defending himself against the accusation by the means and methods established by law. Under Article 48 of the same Code, the defendant has the right to choose his own advocate. However, by ignoring the circumstances surrounding the accused's failure to perfect his right of defense, the court in the Shcharansky case did not adhere to its obligations under the RSFSR Code of Criminal Procedure. Especially in light of the case of Zhitnov, in which the Criminal Chamber of the USSR Supreme Court ruled that a trial court must take an interest in the motives and reasons of an accused person who refuses an advocate.[51] In a directive of the Plenum of the Soviet Supreme Court of June 16, 1978 entitled "Concerning the Practice of the Application by Courts of the Laws Guaranteeing to the Accused the Right of Defense," the court instructed all lower courts to consider

> whether or not the refusal of a defense counsel was voluntary, [in particular] due to a lack of money to pay the service of an advocate or because he did not appear in the courtroom. If the court estabishes that the refusal was not voluntary, it has to guarantee the participation of a defense counsel. The refusal by the defendant of his defense counsel has to be discussed by the court and the court has to take the appropriate decision.[52]

51. Case of Zhitnov, Criminal Chamber of the USSR Supreme Court, November 30, 1973, 4 BIULLETIN' VERKHOVNOGO SUDA SSSR 23 (1974) [BULLETIN OF THE SUPREME COURT OF THE USSR]. See further on this question: E.G. MARTYNCHUK, GARANTII PRAV OBVINIAEMOGO V SUDE PERVOI INSTANTII 173-174 (1975) [GUARNTEES OF THE RIGHTS OF THE ACCUSED IN TRIAL COURTS].

52. 4 BIULLETEN' VERKHOVNOGO SUDA SSSR 10 (1978) [BULLETIN OF THE SUPREME COURT OF THE USSR]. *See also* 2 BIULLETEN' VERKHOVNOGO SUDA RSFSR 9 (1976) [BUL-

On June 16, 1977, the accused's mother had invited the advocate Dina Kaminskaia, a member of the Moscow Collegium of Advocates, to undertake Shcharansky's defense. According to a later statement of Kaminskaia, she was unable to accept the case because she did not have the special permit (*dopusk*) necessary to defend a person accused in political cases. The accused's mother then approached the President of the Moscow Collegium of Advocates to ask for such special permission on behalf of Kaminskaia, but the President refused permission. On June 28, 1977, Kaminskaia was expelled from the Moscow Collegium of Advocates, and was thereby barred from the further practice of law.[53]

Upon the advice of Kaminskaia, the accused's mother subsequently approached at least twenty other Soviet trial lawyers. Some refused to handle the case because they lacked the necessary special permission; others were willing to defend Shcharansky only if he would first plead guilty to the charges.

According to Soviet law, "only a person who is a member of a Collegium of Advocates may engage in advocate's activity."[54] Such Collegia are defined by law as voluntary associations of persons engaged in advocate's activity, but they are formed on a territorial basis.[55] Therefore, a lawyer in Moscow may engage in advocate's activity only if he is a member of the Collegium of Advocates of the city of Moscow. Under the law operative at the time of Shcharansky's trial, admission to the Collegium was granted by the Presidium of the Collegium, but the executive committee of the Soviet of People's Deputies of the City of Moscow (the city government) could veto the admission. An advocate could be disbarred

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LETIN OF THE RSFSR SUPREME COURT]; and, 4 BIULLETEN' VERKHOVONOGO SUDA RSFSR 11 (1980).

53. Similar harassment has occurred in other cases. The advocate and party-member Zolotukhin, who had pleaded non-guilty in the first (1968) trial against Gintsburg, was also disbarred and expelled from the party. Also the advocate I.S. Yezhov has been removed from the register of the Kiev Collegium of Advocates in 1973 after a defense in a political trial. *See* for these and other cases of repressive actions towards advocates PRISONERS OF CONSCIENCE, *supra* note 49, at 72-74. *See also* the Case of Bashkirov, Supreme Court of the Iakut ASSR, (1976) 42 CHRONICLE OF CURRENT EVENTS 7-10 (1976), in which the chosen Iakut advocate Medvedev had been admitted as defense counsel after a number of incidents in Iakutsk and Moscow. However, in his last word Bashkirov refuted the line of defense of his advocate.

54. Statute on the Advocates of the RSFSR of July 25, 1962, art. 4, VEDOMOSTI VERKHOVNOGO SOVETA RSFSR NO. 28, ITEM 450 (1962) [THE OFFICIAL GAZETTE OF THE SUPREME SOVIET OF THE RSFSR] *translated in* BASIC LAWS ON THE STRUCTURE OF THE SOVIET STATE 307-321 (H.J. Berman & J.B. Quigley, Jr. transl. & eds. 1969).

55. *Id.* art 1.

by the same Presidium or the same executive committee.[56]

According to Article 5 of the RSFSR Statute on the Advocates, the state authorities are empowered to exercise "general direction of Collegia of Advocates" and "supervision of their activity" (the RSFSR Ministry of Justice) and to exercise "organization, direction, and supervision of the activity of Collegia of Advocates" (the exective committee of the local city soviet). Hence, the Collegium is supervised by state authorities, rather than independent of the state authorities. The same observation holds true for the Collegium's dependence upon the Communist Party, the nucleus of all social organizations as stated in the 1977 Soviet Constitution.[57]

Despite the obstacles, there have been Soviet lawyers who have taken up the defense of those accused in political trials. Under the law, an advocate-member of a Collegium generally has the right to freely undertake a case for any client. According to some authors, the advocate is free to refuse any case, at least as a choosen advocate; according to others, he may refuse only for important reasons.[58] Some authors have argued that an advocate may require the accused to confess his guilt before taking up his (or her) defense, but others have argued that it is "perfectly clear that such a recommendation [to plead guilty] does not correspond with the right of the accused to a defense, and with the duty of an advocate to further the protection of the rights of citizens."[59] One author, upon the authority of a work pre-dating World War II, has even argued that "the stronger the public opinion raised against the accused, the stronger the emotions and the indignation, the greater

56. *Id.* art. 5. Under the new USSR law on the advocates of November 30, 1979, the expulsion from a Collegium is carried out only by its Presidium, Statute on the Advocates of the USSR of November 30, 1979, art. 14, [SUPREME SOVIET GAZETTE], No. 49, ITEM 846 (1979) *supra* note 1.

57. More than 60% of Soviet advocates are Party member, J.G. GOLLIGNON, LES JURISTES EN UNION SOVIETIQUES, COLLECTION DES TRAVAUX DU SERVICE DE RECHERCHES JURIDIQUES COMPARATIVES, Paris 1977, p. 203.

58. N.F. Chistiakov, *Obespecheneie obviniaemom prava na zashchitu v sovetskom ugolovnom protsess*, VOPROSY SUDOPROIZVODSTVA I SUDOUSTROISTVA V NOVOM ZAKONODATEL'STVE SOIUZA SSR 225 (1959) [*Providing the Accused With the Right of Defense in the Soviet Criminal Trial*, QUESTIONS OF COURT PROCEDURE AND ORGANIZATION IN NEW USSR LEGISLATION] and E.D. Sinaiskii as cited by Iu. I. STETSOVSKII, ADVOKAT V UGOLOVNOM SUDOPROIZVODSTVE 35 (1972) [THE LAWYER IN CRIMINAL COURT PROCEDURE].

59. M. Nanikishvili, *Pozitsiia advokata v ugolovnom protsesse*, 6 SOTSIALISTICHESKAIA ZAKONNOST' 36 (1965) [*The Position of the Lawyer in the Criminal Trial*, SOVIET LEGALITY]; STETSOVSKII, *supra* note 58, at 36.

the danger of the unconscious prejudice of the court."[60] Nevertheless, a defense attorney does not have a legally guaranteed right to take on any case. The legal consultation office, the actual place of work of an advocate, may still thwart a Collegium member's wish to act as defense counsel, as the advocate needs an "order" of that office before he may take up the defense of an accused.

An additional hurdle must be cleared by Soviet advocates who seek to defend persons accused of so-called political crimes. In cases investigated by the Committee of State Security (*KGB*) (among others, the crimes provided in Arts. 64 and 70 of the RSFSR Criminal Code[61]), a special permit for defense counsel is necessary. This special authorization is given by the chairman of the Presidium of the Collegium of Advocates.[62] There is also evidence that the Committee of State Security has the final say in the issuance of such letters. According to Dina Kaminskaia, in her testimony to the Amsterdam Emergency Conference on Shcharansky, only about 10% of all Soviet defense attorneys have such a permanent clearance (which can still be withdrawn by the authorities at any time). Other lawyers must request a special letter of admittance in a specific trial.

Although Soviet law does not forbid a foreign lawyer from acting on behalf of a criminal defendant in the Soviet Union (see Art. 47, RSFSR Code of Criminal Procedure), neither is a foreign lawyer automatically recognized as an advocate. Under Article 228 of the same Code, a person selected by the accused as a defense counsel must first receive the permission of the court if he or she is not recognized as an advocate under Soviet law (Art. 47, RSFSR Code of Criminal Procedure). Therefore, an accused has no *right* under Soviet law to select a foreign lawyer, but the court in the Shcharansky case could have *permitted* any person to act as a defense counsel, including a foreign lawyer.

According to the Universal Declaration of Human Rights, which the Soviet Union has obligated itself to act in conformity

60. E.S. RIVLIN, SOVETSKAIA ADVOKATURA 72-73 (1926) [*The Soviet Bar*], as cited by STETSOVSKII, *supra* note 58, at 35-36. *See also* I.D. Perlov, *Pravosudie i obshchestvennoe mnenie* [*Justice and Public Opinion*], IZVESTIIA June 30, 1966, at 6 col. 5.

61. Art. 126 of the RSFSR Code of Criminal Procedure, *translated in* THE SOVIET CODES OF LAW, *supra* note 3, at 204.

62. PRISONERS OF CONSCIENCE, *supra* note 49, at 72; V. Chalidze, *supra* note 18, at 146-147; T. TAYLOR, COURTS OF TERROR: SOVIET CRIMINAL JUSTICE AND JEWISH EMIGRATION 23-24, 38 (1976); Y. Luryi, *supra* note 49; the evidence of D. Kaminskaia, as presented in The Petition, *supra* note 43, app. XXXV.

with under the Final Act of Helsinki (point I a. VII), "everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."[63] The International Covenant on Civil and Political Rights states that "everyone shall be entitled [. . .] to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing [and . . .] to defend himself in person or through legal assistance of his own choosing."[64]

If the trial court had been guided by these principles in the Shcharansky trial, it should have allowed the accused the possibility of choosing a foreign lawyer because of the difficulty in finding a Soviet advocate of the accused's choosing. Though only some countries have practiced the admittance of foreign defense counsel in criminal cases (especially, the Federal Republic of Germany in recent years, and Soviet Russia in 1922 in the trial of members of the Socialist Revolutionary Party), the special circumstances of this case and the fact of the adverse pretrial publicity in the Soviet media should have been sufficient reasons to allow admittance of a foreign lawyer of Shcharansky's choice; especially since at least one prominent western defense lawyer had publicly indicated his willingness to travel to the Soviet Union to defend Shcharansky.[65]

E. The Principle of Open Court Sessions

All evidence relied upon by a trial court has to be read in an open court (Art. 240, RSFSR Code of Criminal Procedure), and the court may only rely upon such evidence (Art. 301, RSFSR Code of Criminal Procedure). According to the report of Shcharansky's brother, a number of relevant documents were not read out in the court.

F. The Judgment

Under Article 320 of the RSFSR Code of Criminal Procedure, a copy of the sentence has to be handed over to a convicted person within three days. Shcharansky only received a copy of his sentence in November 1978,[66] four months after the trial. The record of the trial and the judgment are closed to public inspection after

63. The Helenski Final Act, *supra* note 16, art. 11.
64. Civil and Political Covenant, *supra* note 14, art. 14.
65. L'AFFAIRE CHTCHARANSKY, *supra* note 2.
66. KOMMENTARII K UGOLOVNOMU PROTSESSUAL'NOMU KODEKSU RSFSR 333 (1976)

the trial, which poses a number of practically insurmountable difficulties for people who subsequently wish to discover the details of the trial and the sentence.[67]

G. The Question of Judicial Review

According to Article 14, section 5, of the International Covenant on Civil and Political Rights, "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal, according to law." Shcharansky was tried and convicted by the Criminal Chamber of the RSFSR Supreme Court, acting as the court of first instance; under Article 325 of the RSFSR Code of Criminal Procedure "sentences of the RSFSR Supreme Court are not liable to an appeal or protest by way of cassation." Therefore, Shcharansky's right of review guaranteed under the Covenant, was foreclosed under Soviet law.[68]

IV. EVALUATION OF THE PROCEDURAL ASPECTS OF THE TRIAL

Adverse public opinion was generated against Shcharansky beginning in June, 1976 (one month after the founding of the unofficial Public Group to Promote the Observance of the Helsinki Agreements in the Soviet Union). In the press and in a documentary shown on Soviet television, Shcharansky was depicted, together with others, as a "parasite profiting from his anti-Soviet activities," as somebody "ready for everything including betrayal," "a hooligan," and "an enemy of the Fatherland."[69] In an open letter published in the official government daily newspaper *Izvestiia* on March 4, 1977, Shcharansky and others were accused of having collected information concerning the Soviet defense industry upon the instruction of representatives of the United States, who were alleged members of the CIA.[70]

The press campaign in and of itself might not alone have con-

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[COMMENTARY ON THE RSFSR CODE OF CRIMINAL PROCEDURE]; 52 KHRONIKA TEKUSHCHIKH SOBYTII 3 (1979) [CHRONICLE OF CURRENT EVENTS].

67. *See also* TAYLOR, *supra* note 62, at 19.

68. A protest can be filed by the President of the USSR Supreme Court against a decision of the RSFSR Supreme Court sitting as a court of first instance, *see* art. 371 of the RSFSR Code of Criminal Procedure, *translated in* THE SOVIET CODES OF LAW, *supra* note 3, at 297. However, this is a discretionary protest and not an enforceable right which Shcharansky himself could have exercised.

69. The Petition, *supra* note 43, at 20-21.

70. IZVESTIIA March 4, 1977, at 3, col. 6-8; *See also* L'AFFAIRE CHTCHARANSKY, *supra* note 2, at 73-74.

stituted sufficient reason to conclude that Shcharansky's trial was unfair. However, it should have prompted the trial court to use all possibilities provided for by Soviet law to ensure Shcharansky an impartial and fair hearing.[71] As has become clear from those aspects of the trial analyzed *supra*, the court did not adhere to its obligations to ensure the openness of the sessions, to effectively and meaningfully guarantee the accused his right to defense counsel, and to provide for impartiality in the questioning of the witnesses. Moreover, there was an additional factor calling for strict adherence to the principle of fair trial — the lack of an appeal or cassation procedure for Shcharansky under Soviet law, especially important since Shcharansky could have been sentenced to death under Article 64 of the RSFSR Criminal Code.

V. THE TRIAL: THE CHARGES

A. Treason

Shcharansky was accused of the crimes of treason and anti-Soviet agitation and propaganda. Treason is defined by the RSFSR Criminal Code as "an act intentionally committed by a citizen of the USSR to the detriment of the state independence or the military power of the USSR [. . .], espionage, [. . .], rendering assistance to a foreign state in carrying on hostile activity against the USSR."[72] Espionage is defined as

> transfer or the stealing or collection for purpose of transfer, to a foreign state or a foreign organization or their intelligence service of information constituting a state or military secret or the transfer or collection on assignment from a foreign intelligence service of other information for use to the detriment of the interests of the USSR.[73]

Interpreted together, the defendant was charged with an act, intentionally committed, detrimental to the state independence or the military power of the Soviet Union, consisting of:

1. the transfer, or the stealing or collection for purposes of transfer, to a foreign state or foreign organization or its intel-

71. *See also* art. 16 of the RSFSR Code of Criminal Procedure: judges and people's assessors shall decide "under conditions excluding outside pressure upon them." Moreover, art. 20 stresses the requirement of "an objective analysis of the circumstances of the case," *translated in* THE SOVIET CODES OF LAW, *supra* note 3, at 167; *See also* art. 14 of the Civil and Political Covenant, *supra* note 14.

72. Art. 64 of the RSFSR Criminal Code, *translated in* THE SOVIET CODES OF LAW, *supra* note 3, at 91.

73. *Id.* art. 65.

ligence service of information constituting a state or military secret; or

2. the transfer or collection, on assignment from a foreign intelligence, service of other information for use to the detriment of the interests of the USSR; and
rendering assistance to a foreign state in carrying on hostile activity against the USSR.

The concept of state independence is defined broadly by Soviet authors as the "complete independence of the state in its internal and foreign policy;" the possibility for the state "to decide over its fate without foreign interference."[74] The Soviet jurist E.A. Smirnov considers every violation of the sovereignty of the Soviet Union as damaging to state independence. And such violation could be, *e.g.*, "foreign interference in the internal affairs of the USSR" or "the belittlement of the authority of the USSR in foreign relations."[75]

Treason has been defined as an intentional crime which encompasses so-called "direct" and "indirect" intent (Art. 8, RSFSR Criminal Code). Under the criminal code, intent is deemed to exist when the offender could have foreseen the possibility of the consequences of his action.[76]

1. *Transfer of State or Military Secrets*. State secrets are delineated in a list established by Decree of the Soviet Union Council of Ministers of April 28, 1956, and in departmental acts issued to elaborate this list.[77] The list encompasses, *inter alia* "integrated [*svodnyi*] information on the location of military enterprises" (Art. 10). To ascertain whether particular information is considered to be a state secret, the court has to contact the "competent agen-

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74. OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIIA 76 (V.I. Kurlianskii, M.P. Mikhailov eds. 1963) [SPECIALLY DANGEROUS STATE CRIMES]; V.S. KLIAGIN, OTVETSTVENNOST' ZA OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIIA 77 (1973) [RESPONSIBILITY FOR SPECIALLY DANGEROUS STATE CRIMES]; G.Z. ANASHKIN, OTVETSTVENNOST' ZA IZMENU RODINE I SHPIONAZH 112 (1964) [RESPONSIBILITY FOR TREASON AND ESPIONAGE].

75. E.A. SMIROV, OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIIA 133 (1974) [SPECIALLY DANGEROUS STATE CRIMES].

76. *See* on this question ANASHKIN, *supra* note 74, at 146-160 and SMIRNOV, *supra* note 75, at 152-160.

77. Decree of the USSR Council of Ministers of April 28, 1956, 5 KHRONOLOGICHESKOE SOBRANIE ZAKONOV LITOVSKOI SSR, UKAZOV PREZIDIUMA VERKHOVNOGO SOVETA I POSTANOVLENII PRAVITEL'STVA LITOVSKOI SSR 463-464 (1959) [CHRONOLOGICAL COLLECTION OF LAWS OF THE LITHUANIAN SSR: EDICTS OF THE PRESIDIUM OF THE SUPREME SOVIET AND DECREES OF THE GOVERNMENT OF THE LITHUANIIAN SSR]. [Hereinafter, DECREES OF THE PRESIDIUM] The list is still valid, *see* G.P. van den Berg, *State Secrets in the USSR: A Note*, 5 REVIEW OF SOCIALIST LAW No. 2 (1980).

cies."[78] Not every transmission of a state secret can be considered treasonable, but such an act will be considered sufficient if the accused could have foreseen that his action would damage the independence or military power of the state, and if he wishes or consciously admitted the causation of this damage.[79]

Of importance to the Shcharansky case is the concept of a "foreign organization." According to some Soviet textbooks, this means organizations closely related with the government of a foreign country,[80] but others interpret this much more broadly. They mention quite generally "foreign operative capitalist companies."[81]

2. *Transfer or Collection of Other Information* The criminalization of the transfer or collection of "other" information, not classified as a state secret, originates from 1958. According to the initial Soviet commentaries on the 1958 legislation, the information had to be "unpublished" or, alternatively, information which should not be accessible to foreigners.[82] Subsequently, the accessibility of the information was deemed no longer of importance; rather, the nature of the information itself came to be regarded as paramount. Therefore, it was stated in 1964 that "*any* information published in the press or unpublished is the direct object of a criminal attempt in the case of espionage if it is collected or transferred on the *assignment* of a *foreign intelligence service* to the detriment of the interests of the USSR."[83] Thus, the collection of information from the 'bulletins' of Soviet ministeries or other state agencies, or from the local press of information on "the nature of scientific research", or the "sphere of activity of a certain laboratory,"[84] may

78. III KURS SOVETSKOGO UGOLOVNOE PRAVA 264 (N.A. Beliaev & M.G. Shargorodskii eds. 1973) [A COURSE IN SOVIET LAW]; 8 SUDEBNAIA PRAKTIKA VERKHOVNOGO SUDA SSSR 20 (1952) [COURT PRACTICE OF THE USSR SUPREME COURT].

79. Case of M., O., and S., Criminal Chamber of the USSR Supreme Court, KURS SOVETSKOGO UGOLOVNOGO PRAVA, *supra* note 78, at 125.

80. *E.g.* "representatives," OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIIA, *supra* note 74, at 83; SOVETSKOE UGOLOVNOE PRAVO: OSOBENNAIA CHAST' 32 (2d ed. V.D. Menshaggin, N.D. Durmanov & G.A. Kriger, eds. 1975) [SOVIET CRIMINAL LAW: SPECIAL PART].

81. UGOLOVNYI KODEKS UKRAINSKOI SSR: NAUCHO-PRAKTICHESKII KOMMENTARII 211-212 (1978) [CRIMINAL CODE OF THE UKRAINIAN SSR: SCIENTIFIC PRACTICAL COMMENTARY].

82. SOVETSKOE UGOLOVNOE PRAVA: CHAST' OSOBENNAIA 39 (1960) [SOVIET CRIMINAL LAW: SPECIAL PART].

83. ANASHKIN, *supra* note 74, at 88 (emphasis added).

84. KURS SOVETSKOGO UGOLOVNOGO PRAVA, *supra* note 78, at 144-146; OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIIA, *supra* note 74, at 98; ANASHKIN, *supra* note 74, at 88; KOMMENTARII K UGOLOVNOMU KODEKSU LATVIISKOI SSR 171 (1967) [COMMENTARY

also constitute espionage. Even the compilation of a list of retail prices may be held to be spying. If the information is collected on the citizen's own initiative for later transmittal to a foreign intelligence service, this has to be considered as preparation for rendering aid to a foreign state.[85]

3. *Rendering Assistance to a Foreign State* Though treason is already a vaguely defined crime by the inclusion of "other information" in the concept of espionage, the concept of treason becomes even more imprecise if we consider its third form, "rendering assistance to a foreign government in carrying on hostile activity against the Soviet Union." This seems to be the general definition of treason in peacetime.[86]

According to Soviet textbooks, documents which, if transferred, would not constitute a crime under the two above-analyzed forms of treason, may constitute treason under this form. So, "the selection and supply of materials and documents which foreign agents need for their hostile activities and the collection of tendentiously selected material for foreign states" has been categorized as "rendering assistance."[87] The same holds true for the collection of information on the territory of the Soviet Union under the directive of representatives of a foreign state, where the culprit knows that this information will be used to the detriment of the state interests of the Soviet Union.[88] A 1975 Soviet textbook states:

> if a citizen of the USSR collects and elaborates non-objectively, tendentiously, in a anti-Soviet spirit, materials on the Soviet state and social structure, on the level of the development of the economy, on cultural life and social life of Soviet people, and transmits these materials abroad to use them in anti-Soviet publications or in foreign radio broadcasts, then such acts have to be considered as treason.[89]

The Plenum of the Soviet Supreme Court has ruled at the be-

ON THE CRIMINAL CODE OF THE LATVIAN SSR]; UGOLOVNOE PRAVO: CHAST' OSOBENNAIA 29 (1969) CRIMINAL LAW: SPECIAL PART 7; UGOLOVNOE ZAKONODATEL'STVO UKRAINSKOI SSR 117-122 (1971) [CRIMINAL LEGISLATION OF THE UKRAINIAN SSR]; IV KURS SOVETSKOGO UGOLOVNOGO PRAVA (A.A. Piontkovskii, P.S. Romashkin & V.M. Chkhikvadze eds. 1970) 98-99 [A COURSE IN SOVIET CRIMINAL LAW]; UGOLOVNYI KODEKS UKRAINSKOI SSR, *supra* note 81, at 212.

85. *Id.*

86. *Id.*

87. OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIIA, *supra* note 74, at 83.

88. SOVETSKOE UGOLOVNOE PRAVA: OSOBENNAIA CHAST, *supra* note 80, at 35.

89. *Id.*, at 36. *See also* SOVETSKOE UGOLOVNOE PRAVO. CHAST' OSOBENNAIA 25 (1965) [SOVIET CRIMINAL LAW: SPECIAL PART].

ginning of the 1960's that "the transfer of slanderous and other information to representatives of foreign states constitutes treason in the form of rendering assistance in the carrying on of hostile activity against the USSR."[90] It follows that each case of anti-Soviet agitation or propaganda (Art. 70, RSFSR Criminal Code) in which foreign states are directly involved is deemed to be treason.

B. Anti-Soviet Agitation and Propaganda

The other charge made against Shcharansky was that of anti-Soviet agitation and propaganda. This crime is defined as follows:

> Agitation or propaganda carried on for the purpose of subverting or weakening Soviet power [. . .] or the circulation, for the same purpose of slanderous fabrications which defame the Soviet state and social system, or the circulation or preparation or keeping, for the same purpose, of literature of such content, shall be punished by deprivation of freedom for a term of six months to seven years, with or without additional exile for a term of two to five years, or by exile for a term of two to five years.[91]

This offense consists of several forms of agitation or propaganda for the purpose of subverting or weakening Soviet power:

1) open agitation or propaganda, for example, the proclamation in a narrow or wide circle of people of ideas and concepts directed towards subverting or weakening Soviet power; and,
2) the more veiled forms of agitation and propaganda:
   a) the circulation of slanderous fabrications which defame the Soviet state and social system;
   b) the circulation, preparation, or keeping of literature of such content.[92]

In the charge against Shcharansky, the second form of agitation was of special importance as it has been the case in many trials of Soviet dissidents over the last twenty years. It seems likely that this form of anti-Soviet agitation was introduced in 1958 to limit the scope of application of the provisions on counterrevolutionary agitation and propaganda which were applicable in earlier periods of Soviet history.

According to the present RSFSR Criminal Code, the literature

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90. ANASHKIN, *supra* note 74, at 112; KLIAGIN, *supra* note 74, at 121-122.

91. RSFSR Criminal Code, art. 70, ¶ 1, *translated in* THE SOVIET CODES OF LAW, *supra* note 3, at 93.

92. *Id.*

seems to have to contain slanderous fabrications. This has been defined by Soviet authors as statements known to be false and defamatory to the state and social system,[93] or, as the Soviet jurist Kliagin has put it, "circulating information on the Soviet political and social system which is known not to correspond to objective facts and Soviet reality."[94] The requirement of falsity represents a fundamental difference from the crimes concerning the transfer of information considered *supra* (Art. 64). However, Soviet textbooks do not usually accentuate this difference. They state that court practice is based upon the constitutional freedom of speech, which is guaranteed by the Soviet Constitution only in agreement with the interests of the Soviet people and in order to strengthen the socialist system.[95] "In other words: to the enemies of socialism, to the enemies of freedom, Soviet society does not recognize freedom."[96] This could lead to the conclusion that the anti-Soviet character of the information is more important than its falsity. In this way, Soviet legal textbooks use the concept of "anti-Soviet literature" when they deal with literature containing slanderous fabrications.

We may summarize by stating that anti-Soviet literature is *per definitionem* a slanderous fabrication. Viewed in this light, it becomes understandable that the Soviet Union would deem the public showing of slogans such as "Hands off the Czechoslovak SSR," in Moscow in August 1968, as "deliberately false fabrications discrediting the Soviet state and social system."[97] The words "literature of such content" are accordingly interpreted as "literature which defames the Soviet state and social system." In this sense, a 1970 Soviet text has defined literature with anti-Soviet content as:

> all items created by use of the press, letters, drawings destined for the circulation of opinions, ideas and slogans, directed towards the subverting or weakening Soviet power, *or* containing slanderous fabrications, which defame the Soviet state and social system, or which encite one to commit a particularly dangerous

93. OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIIA, *supra* note 74, at 129; IV KURS SOVETSKOGO UGOLOVNOGO PRAVA 117 (1970) [A COURSE IN SOVIET LAW]; SOVETSKOE UGOLOVNOE PRAVA, *supra* note 78, at 169; SOVETSKOE UGOLOVNOE PRAVA *supra* note 80, at 45.

94. KLIAGIN, *supra* note 74, at 185.

95. KURS SOVETSKOGO UGOLOVNOGO PRAVA, *supra* note 78, at 163-164.

96. *Id.* at 169-172; KLIAGIN, *supra* note 74, at 187.

97. *See* the case of Dremliuga, Delone, Bogoraz, Litvinov, and Babitsky, as reported in N. GORBANEVSKAIA, RED SQUARE AT NOON (1972). They were tried under art. 190-1 of the RSFSR Criminal Code.

state crime.[98]

A second point which needs elaboration is the question of "anti-Soviet intent." The accused must have "intent directed against subverting or weakening Soviet power." Therefore, if the culprit's intent was not directed towards subversion, he is not guilty under this Article of the Criminal Code. He must have shown hostile purposes. If the actions were provoked by "discontent raised in connection with temporary difficulties or incorrect bureaucratic actions of an official, it may not qualify as anti-Soviet agitation and progaganda."[99] Further, "a critical assessment of a measure in the field of the internal or external policy"[100] may not be considered an anti-Soviet agitation. However, nearly all Soviet authors who have recently written on this subject concur that the sending of letters, documents, literature and other items that contain slanderous fabrications which defame the Soviet political and social system, "to international organizations or organizations of foreign states, to officials of such organizations, to political or public persons or other persons, or to the organs of the press, radio and television of other states," has to be considered as anti-Soviet agitation and propaganda.[101] The same holds true for the preparation or keeping of such material for the purpose of sending them to the above-mentioned entities for the same ends.[102]

VI. EVALUATION OF THE ARTICLES OF THE RSFSR CRIMINAL CODE CONSTITUTING THE CHARGE

The considered Articles of the RSFSR Criminal Code form an elaboration of the provisions of the 1977 Soviet Constitution defining freedom of expression as follows:

> In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, of assembly, of meetings and of street marches, and demonstrations.
>
> The exercise of these political freedoms is ensured by making available public buildings, streets, and squares to the working people and their organizations, by the wide dissemination of

98. IV KURS SOVETSKOGO UGOLOVNOGO PRAVA 118-119 (1970) [A COURSE IN SOVIET CRIMINAL LAW] (emphasis added).

99. KURS SOVETSKOGO UGOLOVNOGO PRAVA, *supra* note 78, at 173; KLIAGIN, *supra* note 74, at 197.

100. KURS SOVETSKOGO UGOLOVNOGO PRAVA, *supra* note 78, at 174.

101. *Id.* at 172.

102. KLIAGIN, *supra* note 74, at 188-189.

> information, and by the opportunity to make use of press, television, and radio.[103]

Moreover, the Soviet Constitution states in Article 39 that "in exercising their rights and freedoms, citizens may not injure the interests of society and the state or the rights of other citizens." Article 59 adds: "the exercise of rights and freedoms is inseparable from the performance by a citizen of his duties." One of these duties is the safeguarding of "the interests of the Soviet state" and the promotion of "the growth of its power and its authority."

There can be no doubt that the considered articles of the Criminal Code under which Shcharansky was tried and convicted are in full agreement with the letter and spirit of the Soviet Constitution. However, the international legal rules by which the Soviet Union is bound proclaim the freedom of expression in clearer terms. The Universal Declaration of Human Rights has defined the freedom of expression as follows:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[104]

The International Covenant on Civil and Political Rights proclaims:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include *freedom to* seek, receive and *impart information and ideas of all kinds, regardless of frontiers*, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary:
>
> a. For respect of the rights or reputations of others;
>
> b. For the protection of national security or of public order (*ordre poublic*), or of public health or morals.[105]

From the above analysis of the Articles of the RSFSR Criminal Code defining the crimes of treason and anti-Soviet agitation

103. Art. 55 of the USSR Constitution, *translated in* THE CONSTITUTIONS OF THE COMMUNIST WORLD 367 (W.B. Simons ed. 1980).

104. Civil and Political Covenant, *supra* note 14, art. 19.

105. *Id.* (emphasis added).

and propaganda, it becomes clear that Soviet lawmakers have used very vague concepts, evidenced by terms such as "other information," "rendering assistance to a foreign state," "hostile activities," "slanderous fabrication," and "defaming the Soviet state and social system." The examples taken from Soviet legal literature only strengthen this conclusion. Indeed, all information concerning an issue that is deemed to be politically sensitive in the Soviet Union may be used by a foreign state to criticize an aspect of the Soviet system. Therefore assistance in gathering such information may qualify as treason: "the gravest crime against the people."[106] The Soviet terms of art may easily be stretched in such a way that all information, apart from trivialities, falls under one of the analyzed Articles of the Criminal Code.

For these reasons, one could conclude that the Soviet Union follows a policy aimed at crippling the right to freedom of expression, especially the right of freedom to impart information of all kinds regardless of frontiers, and this is certainly not in keeping with the Soviet Union's international obligations (Art. 19, juncto Art. 5 of the Covenant).

VII. THE EVIDENCE AND ITS EVALUATION

From the reports of the trial that have become available in the West, it is clear that the charge of *espionage* was based upon the prosecution's assertion that Shcharansky compiled lists of people who had been refused an exit visa. From the materials available to us in our research, three such lists can be identified.

1. A cumulative list of people who have been refused exit visas. According to the trial reports, this list allegedly encompassed about 1300 people refused visas, *inter alia*, for security reasons. The security reasons were supposedly spelled out in the list in some detail, and in about 200 instances the prosecution alleged that details were included on the location, administrative subordination, and security rating of enterprises of the defense industry, together with names of leading officials therein.
   According to a comment in the Moscow *samizdat Chronicle of Current Events* and the testimony delivered at the Amsterdam Emergency Conference on Shcharansky, the cumulative list contained other data than that put forward by the prosecution

106. Art. 62 of the USSR Constitution *translated in* THE CONSTITUTIONS OF THE COMMUNIST WORLD, *supra* note 103, at 367.

at the trial.[107] Jewish activists began keeping a list when it became clear that some people had been refused visas over a long period of time. Those who were refused visas passed on information about themselves to those keeping the list, either directly or through a "chain" of acquaintances. The grounds for refusal: "service in the army," "refusal of family to consent," or "security reasons" was included in the list. In some exceptional cases, the place of work was entered in order to show the inappropriateness of a refusal on grounds of security. (As of 1977, the list contained about 800 names, including about 250 from Moscow and about 150 from Leningrad.[108]) The list itself was typed by Dina Belina (a witness at the Amsterdam Emergency Conference), who had also made notes upon it in her own handwriting. The existence of this list had never been kept secret; it was known to a wide circle of people. The list was also sent abroad. Often, it was read over the telephone during international calls.

2. A different list contained the names of people to whom an exist visa was refused on the ground that reunification of the family was not involved. This list is included in Document No. 4 (issued June 27, 1976) of the unofficial Public Group to Promote the Observance of the Helsinki Agreement in the Soviet Union.[109] This list does not appear to contain "secret" information.
3. According to the *Chronicle of Current Events* a third list was prepared containing the names of 70-80 people. Whether this third list was inspired by a letter and questionnaire sent by Vitaly Rubin (who emigrated in 1976 to Israel) to Moscow through the United States Embassy is uncertain.[110] The *Chronicle of Current Events* comments:

   As regards to the questionnaire sent to Shcharansky by Rubin's wife, it is known that it arrived in Moscow via the American Embassy's diplomatic bag. The envelope was given by the Americans to Lipavsky. Lipavsky took it to the home of one of the refuseniks with a request that it be given to Shcharansky. They did not manage to do this — the house was searched a few days later and the envelope with the questionnaire was confiscated. The questionnaire was compiled for those who had re-

107. 50 A CHRONICLE OF CURRENT EVENTS 51 (1979).
108. The Petition, *supra* note 43, app. H-XIX.
109. *Id.*
110. 50 A CHRONICLE OF CURRENT EVENTS 51-52 (1979).

fused visas for undisclosed reasons.[111]

Rubin has denied being a CIA agent and having sent Shcharansky a letter of instructions. Unfortunately, a declaration by Rubin's wife, Inessa Axelrod, is absent, the questionnaire was supposed to contain remarks which were written, according to the prosecution testimony in the trial, by Rubin's wife. In any event, the "Rubin letter" was given to Lipavsky who, according to dissident sources, was an agent of the *KGB*. Lipavsky purportedly then handed the letter to the *KGB*. The questionnaire had been confiscated by prosecution investigators, but not when it was in Shcharansky's possession. There does not seem to be any evidence that Shcharansky had even seen the letter or the questionnaire. Shcharansky himself stated that the first time he had seen the questionnaire was during the preliminary investigation.

This third list was typed by Zapalayeva. She testified during the trial that she had typed lists of refuseniks and that Lipavsky had brought her this work and collected it. Lipavsky told her that he was doing it on Shcharansky's behalf. To Shcharansky's question, Zapalayeva replied that he (Shcharansky) had never asked for her help. Nevertheless, the

> above-mentioned letter of Rubin and the questionnaire and lists enumerated in the indictment, along with Shcharansky's notebooks, were examined as material evidence. The notebooks were found to contain the surnames and addresses of 15 refuseniks whose names appeared on the list. The court considered this to be proof that Shcharansky had compiled the lists. There was no stamp of 'secret' on any of the documents filed in the case materials or put before the court. Not a single list was read out.[112]

Taken together, this makes extremely dubious any claim by the prosecution that it proved beyond doubt that Shcharansky made up a list (or any part of it) of refuseniks. And that this list contained so much data on the location of military-industrial enterprises that one could speak of an "integrated list" of such enterprises as is required by section 10 of the Decree of the Soviet Council of Ministers of April 28, 1956, listing state secrets.[113] Convincing evidence is also lacking as to whether Shcharansky transferred such data to "a foreign state or a foreign organization or its intelligence service." According to Shcharansky, he had told Rob-

111. *Id.* at 53; the letter is partly *reprinted in*: BELAIA KNIGA. SVIDELTEL'STVA FAKTY DOKUMENTY 206 (1979) [THE WHITE BOOK: EVIDENCE, FACTS, DOCUMENTS].

112. 50 A CHRONICLE OF CURRENT EVENTS 58 (1979).

113. *See* DECREES OF THE PRESIDIUM, *supra* note 77.

ert Toth (at that time the Moscow correspondent of the *Los Angeles Times*) that one could find data easily in the West which Toth needed for an article.

Where the charge concerns the transfer or collection of "other information" (that is, information not amounting to a state secret), it was not proved that Shcharansky acted in any way "on assignment from a foreign intelligence service," nor was any evidence submitted by the prosecution to substantiate its claim that Robert Toth had been a member of a foreign intelligence service. One can therefore conclude that Shcharansky should not have been convicted of this form of treason under Soviet law.

The third charge against Shcharansky of treason was "rendering assistance to a foreign state in carrying on hostile activity against the USSR."[114] The prosecution's charge encompassed, in essence, the sending abroad of material constituting anti-Soviet agitation and propaganda, in order

a) to give the governments of various countries a basis to urge the Soviet Union to change (especially) its internal policy to comply with its international obligations in the field of human rights; and
b) to hamper the USSR-USA trade negotitions by appeals to support the Jackson-Vanik Amendment.

According to the indictment, Shcharansky took part in conspiratorial meetings of Jewish activists with American senators and representatives who went to Moscow on an official visit in 1975. He made a speech to them in which he called for a severe and uncompromising policy with regard to trade with the Soviet Union, and gave them a letter from refuseniks asking the Congressman to demand that the Soviet Union change its emigration policy. Further, the indictment charged that in June 1975, in the lobby of the Sovetskaia Hotel, Shcharansky had a secret meeting with the American scholar Professor Richard Pipes. Pipes, who was a supposed link between the refuseniks and American Zionists and diplomats, allegedly gave Shcharansky instructions regarding Zionist activities. He was said to have approved of Shcharansky's speech to the senators and to have stated that they had gained an advantage through meeting Jewish activists before their official engagements. Then Pipes supposedly gave Shcharansky instructions on the formation of the Helsinki Group. Shcharansky is also charged with meeting

114. 50 A CHRONICLE OF CURRENT EVENTS 45-46 (1979).

United States Senator Brooke. In February 1976, Shcharansky brought Brooke to Vladimir Slepak's apartment, where Slepak, Shcharansky, and other Jewish activists signed a letter to Senator Jackson on the subject of the Jackson-Vanik Amendment (letter dated January 12, 1976). Concerning these charges, Shcharansky has said:

1. The meeting with American congressmen was not conspiratorial. Foreign correspondents and correspondents of the communist press elsewhere in Europe were invited. Moreover, according to a United States Senator's statement, the Soviet authorities knew in advance about the meeting.[115]
2. The charge that the Soviet Union was not offered more favorable trading terms on account of the refuseniks is absurd. It was not their fault that the Soviet Union, unlike Romania, for example, could not reach a compromise solution on this issue. The Soviet authorities' lack of desire to fulfill the international obligations they had assumed was responsible for the Jackson-Vanik Amendment.[116] Speaking on behalf of all refuseniks, Shcharansky asserted that in letters and appeals and at meetings with American politicians they had called for compromises. The investigation and the indictment in the Shcharansky case highlighted one side of the refuseniks' appeals because the authorities did not wish to look at the other.
3. The letter of January 12, 1976 had not been composed on Senator Jackson's instructions.
4. The meeting with Professor Pipes took place on June 4, 1975, nearly 2 months before the signing of the Helsinki Act. According to Shcharansky, he had discussed his history book with Pipes. Pipes himself has declared that they had only the ordinary social talk. The prosecution's charge was based on the testimony of only one witness.
5. As to the episode involving Senator Brooke, Shcharansky showed the inconsistencies in Lipavsky's testimony. Moreover, Lipavsky was not present at the meeting with Senator Brooke.

Under Article 70 of the RSFSR Criminal Code, Shcharansky was charged with preparing and sending materials abroad which deliberately defamed the Soviet political and social system.[117]

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115. 124 CONG. REC. 114 (1978).

116. See the report of the indictment in, 50 A CHRONICLE OF CURRENT EVENTS 55-56 (1979).

117. *Id.* at 47-48.

As has been shown, the crime of anti-Soviet agitation and propaganda has been so vaguely defined under Soviet law and practice that it is almost impossible to refute that at least some of Shcharansky's actions come within the scope of the actions prohibited under the corresponding Article of the RSFSR Criminal Code.

VIII. CONCLUSION

The examination of a trial in a foreign country by outside observers is not an easy task. The legal culture varies considerably among countries; this is especially true with regard to the Soviet legal system. Therefore, considerable attention has been given to an examination of the Shcharansky trial in the framework of Soviet law, as contained in texts of Soviet laws, court practice, and Soviet legal scholarship. We have also been conscious of the fact that although the Soviet Union has adhered to several international documents concerning human rights, it is frequently claimed that these documents have to first be adapted to the Soviet legal system.[118] However, this argument should not free the Soviet Union as a state, bound by its international obligations, from ensuring Soviet citizens the rights embodied in those international documents, especially in the International Covenant on Civil and Political Rights. Moreover, the Soviet Union has obligated itself in the Helsinki Final Act of the 1975 Conference on Security and Co-operation in Europe to act in the field of human rights and fundamental freedoms in conformity with the purposes and principles of the Charter of the United Nations and the Universal Declaration of Human Rights.

The available materials indicate, first of all, that several rules of *Soviet law* have been violated in the conduct of the Shcharansky case. Shcharansky was held in custody for almost sixteen months while Soviet law permits detention for a maximum period of nine months. The fact that the Presidum of the Supreme Soviet prolonged this period does not rectify this violation of Soviet law, as it is not empowered to do so.

During the trial, the court did not adhere to its duties under Soviet law to ensure the openness of its sessions, to protect the right of the accused to defense counsel of his own choosing, and to evidence its impartiality. Only one outsider was able to attend the

118. This claim was again repeated by S.A. Kondrashev, a Soviet delegate to Madrid Review Conference of the Helsinki Agreement; *See* The Times (London), November 25, 1980, at 8, col. 1.

sessions of the court which were formally open to the public; all attempts by Shcharansky's family to obtain a suitable advocate failed due to political control over Soviet advocates, and due to the refusal of the Soviet authorities to allow a foreign lawyer to act as Shcharansky's defense counsel. No witnesses proposed by the accused were admitted by the court to testify. Whenever the court had, under Soviet law, an opportunity to show its impartiality, it failed without exception to do so. The court failed to consider the strong campaign in the press against the accused, and the possibility of the death penalty in a case where the accused had no right under Soviet law to appeal the trial court judgment.

The evidence submitted to the trial court by the prosecution with regard to the charge or treason in the form of espionage was unconvincing. The relevance of the three lists of persons who could not get exit visas to emigrate to Israel is uncertain, and their exact content is unknown as they were not read out in the court. In any event, it is doubtful whether the data collected in these lists could qualify as a state secret under existing Soviet laws. Moreover, qualifying these lists as a state secret appears ludicrous as the lists were known to a wide public within and outside of the Soviet Union. Shcharansky's role (if any) in compiling the lists and in giving publicity to them was not established; it was not proven that the American journalist Robert Toth, former Soviet citizen Valery Rubin, or his wife Inessa Axelod were affiliated with the CIA, or, that Shcharansky was aware of such alleged affiliation. It was not proven that Shcharansky handed over state secrets to Toth; nor was it proven that Rubin's letter, and instruction to make up a list allegedly containing state secrets, were known to Shcharansky or that the letter was authentic.

With regard to the charge of treason in the form of rendering assistance to a foreign state in carrying on hostile activities against the Soviet Union, the evidence is vague and unconvincing.

In the light of the Soviet Union's *international obligations*, three aspects of the Shcharansky trial play a prominent role: the right to leave one's country, the principle of a fair hearing, and the freedom of expression. During the last decade, many Soviet citizens have received permission to leave their country. This appears to be a major change in Soviet policy in this area as compared with the years before 1970. Also, the gradual lowering of the exacted fees is an improvement. However, the Soviet Union still does not provide its citizens, and other persons lawfully within its territory,

with a legally enforceable right to leave the country. Further, those administrative and legal restrictions to emigration from the Soviet Union — which might be categorized as being in the national interest of the Soviet Union and thus be compatible with the provisions of the International Covenant on Civil and Political Rights — have not been enumerated in any published Soviet legal document. Effective remedies against the refusal to issue an exit visa are lacking. The absence of clear legal regulations in this field has resulted in arbitrary decisions and hardship for those persons who want to leave the Soviet Union or who have been refused an exit visa. Contrary to the letter and spirit of the Helsinki Final Act and the International Covenant on Civil and Political Rights, the Soviet Union appears to be using the criterion of family reunification as a general basis of its emigration policy, and yet it frequently refuses exit visas even on this basis. Moreover, the Soviet Union seems to follow a discriminatory policy with regard to Jews who want to emigrate to Israel by forcing them to first give up their Soviet citizenship.

With regard to the observance during the Shcharansky trial of the principle of a fair hearing as laid down in Article 14 of the International Covenant on Civil and Politioal Rights, we refer to the material contained in this article on the failure by the trial court to ensure a fair trial: Anatoly Shcharanky did not have a remedy against unlawful custody, was not guaranteed a defense counsel of his own choosing, and was not allowed the right to obtain the attendence and examination of witnesses on his behalf under the same conditions as witnesses for the prosecution. In addition, contrary to the provisions of the International Covenant, Shcharansky had no enforceable right to appeal or protest the trial court judgment by way of cassation.

The right of freedom of expression as proclaimed by the 1977 Soviet Constitution is only guaranteed insofar as it is exercised in accordance with the interests of the Soviet people and in order to strengthen and develop the socialist system. Those Articles of the RSFSR Criminal Code which embody limitations to the freedom of expression are so vague that they cannot qualify as having been drawn up in agreement with the spirit of the International Covenant on Civil and Political Rights. Every collection or transfer of information that is deemed to be politically sensitive may constitute the crime of treason (if a foreign state is involved), or of being anti-Soviet. The Soviet Union follows a policy aimed at the destruction of the right to freedom of expression, and especially of the freedom

to impart information of all kinds regardless of frontiers, and this runs counter to the international obligations of the Soviet Union, as contained in the International Covenant and the Helsinki Agreement.

The signature of the International Covenants and the Helsinki Final Act by the Soviet Union certainly constitutes a positive development in the field of human rights. However, the public signature of these documents surely cannot be considered the culmination of Soviet human rights policy. For unless the Soviet Union has signed these agreements only as an external propaganda exercise, the goal must instead be the implementation of the provisions of these agreements in domestic Soviet legislation and a consistent and nondiscriminatory application of such legislation in regard to all Soviet citizens.

As the present analysis has shown, with respect to at least the case of Anatoly Shcharansky, this end goal has yet to be reached in the Soviet Union.