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East European Perceptions of the Helsinki Final Act and the Role of Citizen Initiatives

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EAST EUROPEAN PERCEPTIONS OF THE HELSINKI FINAL ACT AND THE ROLE OF CITIZEN INITIATIVES

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I. INTRODUCTION

Human rights are articulable expressions of legal ideas that can be readily identified. The developments of the last thirty-five years have created a duality of sources from which fundamental rights of the individual derive. There are, on the one hand, national human rights. They derive from the constitution and the laws of each nation, from its traditions, values and other elements that make up what may be appropriately called the "national human rights culture." They are expressive of the specific needs

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of each society and indicate the purposes for which governments are created. They necessarily differ from one country to another. For example, Soviet legislation will never duplicate the Bill of Rights of the United States Constitution nor can United States civil rights legislation be expected to comport with the Soviet Constitution.

Despite these differences international human rights have emerged. They are a product of the universal human rights culture built on faith "in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,"[1] and on the conviction that respect for the fundamental freedoms of the individual is an indispensable condition for peace. Because of these beliefs, governments have accepted the concept of universal human rights, agreed that they are appropriate for international concern, cooperated in defining them, assumed international obligations to respect them, and submitted to some international scrutiny as to their compliance with these obligations.[2]

It is essential to bring these two sets of sources closer together and to find a mode of converging national and universal standards into a single system of human rights guarantees. The critical elements in this synthesis are international instruments such as the Universal Declaration of Human Rights,[3] the International Covenants on Human Rights,[4] and the Final Act of the Conference on Security and Cooperation in Europe.[5] These instruments not only set forth binding standards that ought to be followed but also provide for measures of domestic and international implementation of the rights. At the same time, they serve as springboards for independent actions by the citizenry in the cause of human dignity.

According to a principle that has been expressed in several sources of international law, whenever a conflict between international standards and national laws and regulations arises, the pro-

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1. Preamble to the U.N. CHARTER.

2. *See* lecture by L. Henkin, *Rights: American and Human,* Center for the Study of Human Rights, Columbia University (Apr. 2, 1979).

3. G.A. Res. 217, U.N. Doc. A/810 (1948).

4. G.A. Res. 2200 A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

5. *Conference on Security and Cooperation in Europe: Final Act* [hereinafter *Final Act*], Helsinki, Aug. 1975, *reprinted in* 73 DEP'T STATE BULL. 323 (1975), 14 INT'L LEGAL MAT. 1923 (1975). *See* Appendix A.

vision giving protection to the rights of the individual should apply.[6] National laws conforming to or exceeding international standards preserve their full autonomy, while international standards take precedence over domestic legislation when domestic recognition of individual rights does not meet those standards.

Quite naturally, a domestic legal system and international standards cannot be expected to interact without problems. Despite its antiquity as a moral concept, human rights is a relatively new area of international regulation and one which still requires a great deal of exploration and implementation. Generally, there is a lack of legal tradition in implementing international treaties bearing upon the status of the individual domestically. It is little suprise, then, that states are not accustomed to responding to the demands of international law with the same sense of obligation they feel when confronted with well-established and tested concepts. Many of them consider international human rights as a sort of "soft law" which lacks a regulative means of enforcement that could underpin its authority. A subconscious resistance to surrendering the freedom of action in a field that is regarded as one of the remaining bastions of unrestricted sovereignty further accounts for states' ambivalence toward the international standards of human rights. Preoccupation with defensive vigilance makes states believe that for every thought regarding limitation of their freedom of action, there must be ten for its preservation.

The ordinary processes of international enforcement of universal standards have been rejected by some states as an improper intervention in their internal affairs because of their jealous guard of sovereignty. Compliance with human rights obligations consequently is influenced by a balancing of state interests, imaginary or real, which too often tilts toward an almost atavistic demand for security and other elements encouraging authoritarian interference with the rights of the individual. Such an approach necessarily produces an order of priorities in which human rights become an expendable commodity.

The exclusion of international scrutiny leads to a situation in which human rights must rely for their application solely on the process of composite self-restraint by the government. The forces which bring about self-restraint, such as fear of negative public opinion, moral views of government officers, and institutional re-

6. *E.g.*, Covenant on Civil and Political Rights, art. 5, *supra* note 4.

sistance to breaking rules, are not of equal strength in all countries. Where democratic traditions are lacking and blind obedience to the dictates of the power center overshadows the moral sentiments of the bureaucracy, or where the rule of law has not established itself as the fundamental principle of the system of government, the stimuli for compliance are incomparably weaker than in countries where the whole governmental structure would be jeopardized if their officiary ignored independent opinion, disregarded moral principles, or denied institutional autonomy in pursuing the rule of law.

Exacerbated ideological differences also account for the resistance to international scrutiny. Although diverse cultures will probably always express human rights in idiosyncratic ways and be open to varying interpretations in different national and ideological settings, it is important to ensure that the issue of human rights is isolated from the ideological struggle with which it has so often been intermixed during periods of international tension. Unfortunately, the defensive mentality of the Cold War is still very much alive today, and the Helsinki process has been slow in changing it. It is important, therefore, that states stop using human rights as a means of scoring propaganda victories or, even worse, of utilizing weak spots in the adversary's political system for advancing special political or strategic interests. Accordingly, it will remain a test of statesmanship for all governments concerned to resist temptation to use human rights concerns for these purposes.

The participants of the Helsinki Conference seem to have realized that the problem involved in implementing human rights standards was not achievement of doctrinal or ideological unity but rather agreement concerning rights, including the realization and defense of those rights—which might be justified on highly divergent philosophical grounds. They dealt with the issue, therefore, in the context of international cooperation, and they provided for sustained progress through: (1) a thoughtful but energetic diplomacy striving for constructive dialogue and practical problem-solving, and (2) involvement in this endeavor of the actor most directly concerned—the individual himself.

II. Problems of Implementation

The term "implementation," as used in the Helsinki Final Act,[7] refers to appropriate unilateral, bilateral, and multilateral measures undertaken by signatory states for the purpose of encouraging respect for human rights and promoting the efficacy of international guarantees built into the Helsinki system. It focuses on measures of a cooperative nature, but it in no way precludes the use of feasible means of international scrutiny and—in a broader context of international legal obligations relevant to the purposes of the Helsinki system—use of sanctions, when necessary.

As an implementation measure, cooperation, including discussion, does not seem to give rise to practical difficulties. Obviously, all the parties, the Soviet Union and other states of Eastern Europe not excluded, are agreed that exchanges of opinions on how a state complies with its human rights obligations constitute a normal means of implementation.[8] Problems arise when measures of scrutiny and enforcement are contemplated. Few, if any, are explicitly defined in the Helsinki Final Act and some are even excluded by reason of the uncertain legal status of the instrument and the absence of a general agreement by the parties to resort to institutionalized third-party procedures, such as arbitration or adjudication. Most of the problems, however, are inherent in the very purpose of a system which makes the observance of fundamental rights of the individual a matter of common concern to all the signatories. In the field of human rights, as in other fields where states seek to give expression to a shared interest, the

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7. *See, e.g., Final Act, supra* note 5 at Basket I, Principle X.

8. *Compare* the element of consensus in the polemical response of a spokesman for the Soviet Foreign Ministry to Western statements concerning the legitimacy of monitoring activities: "Our answer to those persons is that no one has given you the right to check up on others, especially when the others are independent, sovereign states. *If you want to exchange opinions, that's another matter.*" 29 Current Dig. Soviet Press No. 6 at 5 (1977). *Compare also* the following statement of the United States Government: "The United States welcomes criticism of its record as natural and constructive. The U.S. does not, for example, consider discussion of its own record by foreign governments to be contrary to Principle VI of the Final Act, which concerns noninterference in internal affairs. Implementation of the Final Act by any signatory is clearly a legitimate concern of all signatories." Sixth Semiannual Report by the President to the Commission on Security and Cooperation in Europe on the Implementation of the Helsinki Final Act, Dep't State Special Rep. No. 54 at 3 (July 1979).

problem is not merely one of drawing up agreements but of seeing that agreements are effectively applied. It is therefore natural to expect that states would raise their voices whenever, in their judgment, such agreements are not fulfilled and the purposes for which they were concluded demand such response. The right to urge compliance and to protest against infringements of the obligations assumed by the Helsinki signatories obviously constitutes a legitimate means of manifesting the international interest in the name of the system created by the Helsinki Final Act.[9]

Outside the Helsinki context, the Soviet Union and its allies have recognized the right of the international community to speak out in defense of fundamental human rights. On many occasions the Soviets themselves have demanded or supported other countries in demanding an international censure of specific human rights violations. They have actively sought international action against violations of human rights in Chile and South Africa and have supported the creation of special bodies "to investigate violations of human rights by fascist and military governments" on the ground that "the policy pursued by military-fascist dictatorships negates the aims and principles of the United Nations Charter and is accompanied by mass and systematic violations of elementary human rights and freedoms."[10]

As regards their own performance, however, the Soviet Union and other East European countries continue to regard any form of outside attention as an inadmissible intervention in their internal affairs. In referring to the agenda for the Belgrade Follow-Up Conference before the U.N. General Assembly in 1977, Soviet Foreign Minister Gromyko declared: "Any attempts at preaching to us, at reading us sermons or, still worse, at interfering in our domestic affairs under contrived pretexts, have encountered and will always encounter a most resolute rebuff."[11]

It is surely desirable that no attempts be made to set the clock of international development back to the time when all international attention to the human condition was regarded as improper penetration into the realm of national control. While it must be

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9. *Cf.* Schachter, Book Review, 17 COLUM. J. TRANSNAT'L L. 535 (1978), (HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD, (T. Buergenthal, ed. 1977)).

10. Kartashkin, *Human Rights and Peaceful Coexistence,* 9 REVUE DES DROITS DE L'HOMME, No. 1 at 14 (1976).

11. 32 U.N. GAOR (8th Plen. mtg.) 105 (1977).

recognized that non-interference in another sovereign's internal affairs is a sound principle which has relevance to matters of human rights, the mere fact that a state presses its claim of sovereignty cannot render the principle operative. The principle will remain inapplicable in all instances where a purported external action—be it a mere comment, friendly advice, reminder, quiet approach on behalf of a victim, or a more audible form of disapproval such as public censure, diplomatic representation, complaint to an international body or, in serious cases, retaliation—is clearly in response to an infringement of the obligations owed to the Helsinki community.

The issue arises time and again in different contexts and in relation to diverse sets of circumstances. For instance, at the 1979 session of the U.N. General Assembly, when confronted with a call for the release of six human rights activists convicted by a court in Prague, Czechoslovakia contended that the delegations expressing their concern were interfering in its internal affairs and were thereby violating international law.[12] In reply to the contention, the United States representative said:

> If nations are parties to declarations, covenants, treaties or accords, and violations of such agreements are alleged, it is the right—no, it is the duty—of signatory powers to ask what those agreements mean and whether they are truly intended to be honored. To arrest and criminally indict and imprison individuals who have only exercised rights guaranteed them by international agreements obligates those who wish agreements to have real meaning to speak out in protest.[13]

The official position of most East European countries is that the Helsinki Accord confers no rights directly on the individual, and that any international undertakings in the human rights field are applicable only within the framework of the legal and political systems of each participating state. Soviet and East European writers, when addressing themselves to the issue, invariably argue that international commitments in this area are transformed by the peculiarities of the social system in which they are applied and that the character of the socio-economic system determines the scope of implementation of human rights. It is, therefore, not

12. Debate before the Third (Social, Cultural and Humanitarian) Committee of the U.N. General Assembly (press release, Oct. 26, 1979).

13. *See* statement by Ambassador van den Heuvel before the Third Committee of the General Assembly. *Id.*

surprising that despite the conclusion of international agreements containing a list of human rights, the real scope and guarantee of their implementation by the signatory countries is often drastically different.[14] The Western signatories, in general, are prepared to accept the premise that the state is the normal agency for the protection of rights. They are unwilling, however, to subscribe to the view that the scope and contents of universal human rights standards may change, through a process of integration with domestic law, such that virtually no room is left for comparison with the universal standards and, consequently, for a meaningful scrutiny of performance by the community of nations.

There is wide support in private circles in the Soviet Union and in Eastern Europe for the view that the Helsinki Final Act has established a legitimacy of international concern about compliance with its human rights provisions. As should be expected, that support is manifest first by the statements of human rights activists who hold that failure to show some degree of international solidarity with victims of human rights violations constitutes acquiescence to their fate incompatible with the solemn Helsinki pledge to uphold jointly the international standards of human rights. The activists generally disclaim their governments' tendencies to reject all international attention to the situation of human rights in their countries as impermissible interference. As Andrei D. Sakharov stated, "To assert that the defense of human rights is interference in internal affairs of any country would mean to refute these documents' validity."[15] The Charter 77 movement in Czechoslovakia has made it a cornerstone of its policy to regard implementation of international standards as "a common affair of all states" and has not hesitated to call the attention of international bodies, both intergovernmental and nongovernmental, to gross violations of civil, political, economic, social and cultural rights of Czechoslovak citizens.[16]

The differences in attitudes and opinions between Eastern and Western nations concerning implementation of international

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14. *Cf.* Kartashkin, *Soveshchanie po Bezopasnosti i Sotrudnichestvu v Europe i Prava Cheloveka (Conference on European Security and Human Rights)*, 4 SOVETSKOE GOSUDARSTVO I PRAVO (Moscow) 91 (1976).

15. A. SAKHAROV, ALARM AND HOPE 138 (1978).

16. *See, e.g.*, the letter of Charter 77 addressed to the representatives of the signatory states assembled for the First Review Conference at Belgrade *in* WHITE PAPER ON CZECHOSLOVAKIA (International Committee for the Support of Charter 77 in Czechoslovakia, pub.) (Paris 1977).

human rights standards show clearly the weaknesses inherent in the Helsinki Final Act. Lack of an effective implementation mechanism was responsible for the failure of the Belgrade Review Conference in 1978. Inability to provide such a mechanism in Belgrade does not augur well for the success of the Madrid meeting in 1980. There is an evident need to define areas in which criticism of human rights performance is fully compatible with respect for existing social and political systems and cannot, under any circumstances, be regarded as an affront to the fundamental principles on which the socialist societies of East European countries are based. If, for instance, the West proceeded according to a perfectionist theory that human rights concerns cannot be satisfied until the political systems in Eastern Europe have undergone fundamental changes, they would risk provoking discord that would make the application of the Helsinki standards impractical. It should not be expected that the Soviet Union would ever accept the notion of democracy as it is defined in the West, just as the Western countries would regard the political principles enshrined in the Soviet system as unacceptable for themselves.

There is an additional reason for restraint by the West. For the Soviet Union and other East European countries, any attempt to formulate the issue of human rights in terms of representative democracy calls into question the legitimacy of their present political system. The Helsinki Accord itself is silent on the question of democracy; but even without such direct linkage, it has considerable potential for stimulating crises of legitimacy in connection with human rights. Consequently, the present regimes in Eastern Europe are very sensitive about any external or internal criticism of the ways in which their political systems actually function. Most of the human rights movements respect the borderline domestically, and certainly do not encourage its trespass by international action. For instance, in a February 1, 1980, statement reassessing its role and political aspirations, the Czechoslovakian Charter 77 unequivocally declared that "it has no intention of changing the existing social system" and that it wants only "to consolidate Czechoslovak statehood by pressing for the observance of laws guaranteed to its citizens by the Constitution of the Republic and supplemented by international pacts on human and political rights."[17]

17. *Charter 77 Assesses Future Role After Three Years' Persecution,* The Times (London), Mar. 2, 1980.

III. The State of Human Rights in Eastern Europe

It would be an easy and essentially incorrect generalization to suggest that the countries of the East European region fail to live up to international standards in every respect. There are clearly areas where their human rights record is commendable, for instance where economic, social, and cultural policies guarantee education, free medical care, and complete health and social insurance for every citizen. The record of compliance with most civil rights is mixed. Political rights are granted only to the extent to which their exercise serves the purpose of strengthening the existing form of government. Of course, there are important differences among individual countries; even within the same country, there are periods of relative tolerance and periods of bigotry. Almost everywhere, however, one finds discrimination—political, religious, sometimes even national and racial.

Existing constitutional provisions do not sanction every departure from the universal standards of human rights. In fact, the constitutions by and large are consonant with the terms of the Universal Declaration and the International Covenants on Human Rights. What, then, accounts for the paradoxical situation characterized, on the one hand, by the existence of laws and treaty commitments expounding fair human rights standards and, on the other hand, by a less than satisfactory performance in putting many of them into effect?

First, the rights of the individual are recognized in practice insofar as they are compatible with the interests of the socialist state, as perceived by the ruling communist party and the government. Loyalty and obedience to the state purpose are elevated to the status of fundamental articles of faith which every citizen is supposed to embrace if he or she wishes to avoid a stigma of social unworthiness.

Preoccupation with security, both internal and external, is the second factor. Rigid discipline in the society sustained by a mixture of ideological campaigns and police pressure is seen as the only available means to hold in check anti-socialist tendencies within the country and ward off perceived external dangers such as ideological subversion and economic enticement.

In periods of political orthodoxy or international tension, the effect of the above policies on human rights can be suffocating as in Czechoslovakia today. There are, in fact, two sets of constitutional provisions in operation, each conflicting with the other.

There is one constitution known to all[18] and a second, secret one, composed of internal directions, party resolutions and departmental instructions. The former sets forth principles which, if conscientiously applied, would guarantee to every citizen a fair standard of rights. The latter, however, makes these principles largely inoperative. It authorizes state agencies to use extra-legal means of pressure, introduces rules discriminating against certain categories of citizens, and interferes with the administration of justice. This second "constitution," of course, introduces an element of arbitrariness and creates an atmosphere of uncertainty. The normal processes of law are thus obstructed and citizens affected by the unpublished rules and regulations have no effective remedy.

Few people in Eastern Europe have ever read Henry David Thoreau's essay on the duty of civil disobedience, but many are familiar in practice with the dilemma that arises in connection with unjust laws: "shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?"[19] The answer is not easy. Human rights activists in Eastern Europe have come to realize that there is no one way to guarantee human rights in their complicated world.

Some activists believe that their major emphasis must be on domestic efforts including moral commitments by individuals to the public constitution; they seek to ensure existence of a citizenry conscious of its rights and vigilant against their erosion. They are convinced that even a small space won for independent and free human rights activity is a space for genuine life in spite of all the negative trends and disruptive effects of an undemocratic political system.

Others tend to look outwardly to an international support system. These activists maintain that external criticism, prompted by concrete cases brought to the attention of responsive international actors have some inhibiting effect on the faulty governments. The Czechoslovak human rights activists used this technique with some success in 1977. The International Confederation of Free Trade Unions brought before the International Labor Organization repressive measures of the Czechoslovak authorities

18. For the text of the 1960 Czechoslovak Constitution *see* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 12-16 (A. Blaustein and G. Pflanz eds. 1974).

19. 1 ANTHOLOGY OF AMERICAN LITERATURE 1483 (2d ed. 1980).

affecting employment of authors and other signatories of Charter 77.[20]

Irrespective of strategic preference for either internal or external pressure on governments, all human rights activists agree that any advance toward more individual freedom is contingent upon an improved atmosphere in the East-West relationship. They share the view that "only detente created the possibility of exerting even minimal influence on both the domestic and foreign policies of the socialist countries," and that "in the name of detente they are required to accommodate their actions to universal humanitarian standards."[21]

IV. CITIZEN INITIATIVES

As a consequence of detente, the issue of human rights has burst forth into wide discussion, both within national societies and on an international scale. The Helsinki Final Act proclaimed in Principle VII "the right of the individual to know and act upon rights and duties." The essence of the provision seeks to ensure that there is a citizenry conscious of its rights and duties and able to obtain a speedy and effective remedy when the rights and freedoms of the individual are being violated. It means that the government may not by any method whatsoever curb use of any procedure essential to the vindication of individual claims, nor may it resort to intimidation or repression to deter the individual from non-violent actions in defense of his or her rights. Citizens have thus been given a point of reference. The human rights provisions

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20. The complaint alleged that the government had taken repressive measures affecting the employment of authors and signatories of Charter 77, a manifesto which brought to public attention criticism of the government's policy on human rights. According to the individual notifications and judicial decisions attached to the representation of the International Confederation of Free Trade Unions, dismissals and other measures affected the employment of workers because they had signed or supported, or refused to condemn, Charter 77. Court decisions held, in particular, that these dismissals had been validly carried out under the Labor Code. Those actions constituted violations of the ILO Convention on Discrimination in Employment and Occupation which prohibits "any exclusion or preference made on the basis of . . . political opinion . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." The case was considered by a committee set up by the Governing Body of ILO and the Governing Body itself, which led to the publication of findings. *See* INTERNATIONAL LABOR OFFICE, 61 OFF. BULL. Ser. A., No. 3, Supp. [hereinafter ILO BULL.] at 10-11 (1978).

21. SAKHAROV, *supra* note 15 at 25-26.

of the Final Act have been viewed, particularly in Eastern Europe, as a sort of international guarantee of the security of the individual and as a springboard for individual claims against the government.

Armed with copies of the Helsinki Final Act, which have been widely disseminated throughout Eastern Europe, thousands of citizens have sought redress of their individual grievances. Even greater numbers have been addressing the authorities on issues involving participation in public life, international exchanges and the benefits of free travel. Apart from individual assertions of human rights, there have emerged collective initiatives by groups of concerned citizens seeking a constructive dialogue with the authorities on human rights issues. These groups have been calling attention to individual cases where human rights are violated, documenting grievances suggesting individual remedies, and making recommendations on ways of improving the general situation. They have also been striving to foster public awareness of human rights and to offer their fellow citizens "a way out of the labyrinth of manipulation, fear and resignation."[22] Charter 77 in Czechoslovakia is a case in point.

On January 1, 1977, a group of 257 Czechoslovak citizens signed a manifesto reminding the political and state authorities of their duty to ensure strict observance of the rights guaranteed to all citizens by the Constitution, the International Covenants on Human Rights and the Helsinki Final Act. The movement has become the focal point of almost all private human rights activities in Czechoslovakia. The Charter 77 manifesto points out:

> Tens of thousands of our citizens are prevented from working in their own fields for the sole purpose that they hold views differing from official ones [and] are discriminated against and harassed in all kind of ways by the authorities and public organizations . . . . [C]ountless young people are prevented from studying because of their own views or even their parents' . . . . [F]reedom of public expression is inhibited by the centralized control of all the communication . . . . [Any exercise of the right to seek, receive and impart information and ideas] is followed by extra-judicial and even judicial sanctions, often in the form of criminal charges . . . . "[F]reedom of religious confession . . . is continually curtailed by arbitrary official action . . . . [The rights to privacy, family, home and correspondence] are seriously vitiated by the various forms of

22. The Times, *supra* note 17.

> interference in the private life of citizens exercised by the Ministry of the Interior, for example by bugging telephones and houses, opening mail, following personal movements, searching homes, setting up networks of neighborhood informers . . . . In cases of prosecution on political grounds, the investigative and judicial organs violate the rights of those charged and of those defending them . . . . [T]he prison treatment of those sentenced in such cases is an affront to their human dignity and a menace to their health, being aimed at breaking their morale . . . . The right to leave the country is consistently violated.[23]

An important element in the philosophy of Charter 77 is "the sense of co-responsibility for the conditions that prevail and for the observance of legally binding standards of human rights," as well as the "belief in the importance of its conscious public acceptance and the general need to give it new and more effective expression." To ward off charges of illegal political activities, the movement affirms that "Charter 77 is not an organization" and that "it does not aim . . . to set out its own platform of political or social reform or change." The international thrust of the movement is emphasized by the statement that "like many similar citizen initiatives in various countries, West and East, it seeks to promote the general public interest," as well as by the mandate given to its spokesmen "to represent it vis-à-vis state and other bodies, and the public at home and abroad."[24]

While the authorities usually tolerate individual petitions since they do not question the discretionary power of the state to make decisions and choices it deems appropriate, the collective initiatives meet with official hostility. They are viewed as attempts to erode the foundations of the socialist society by introducing into the political process a dimension of pluralism alien to the existing system.

The reaction of the Czechoslovak authorities to Charter 77 has been especially harsh. In the months following the proclamation of the Manifesto, its signatories—now numbering more than one thousand individuals from all walks of life—were subjected to police harassment, interrogation, and even arrest. Typing, distribution, and even mere possession of a copy of the manifesto were

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23. For the full text of the Charter and related documents *see* WHITE PAPER, *supra* note 16 at 53-56. *See also* Appendix C *reprinted from* ILO BULL., *supra* note 20 at 54-55.

24. All quotations are from Charter 77.

regarded as acts of subversion or incitement punishable by law. A number of criminal charges were brought against both signatories and non-signatories alike. The Prosecutor General issued a statement on January 31, 1977, binding upon the administrative and judicial bodies, which declared that Charter 77 "is levelled at state structure and socialist society" since "it affirms with the aid of lies that Czechoslovakia constantly violates human rights and the law that its citizens are exposed to oppression as bad as apartheid."[25] He maintained that the movement "calls for actions incompatible with Article 29 of the Constitution, and, contrary to Articles 19, 29 and 34 of the Constitution, demands the organization of anti-socialist and anti-state activities."[26] The Chartists replied to the Prosecutor General's charge by issuing a statement to the effect that: "Charter 77 is entirely within the law, particularly Articles 28 and 29 of the Constitution which guarantees the right of petition."[27]

Despite Charter 77's response, the statement of the Prosecutor General was taken as a legal ground for dismissing about 100 persons from their jobs in various sectors of industry, administration, education, and culture. Most lost their jobs because they had signed the Manifesto. The reasons given by their employers included assertions that the signing of Charter 77 was "a serious offense against the interests of the working class and a serious infringement of socialist work discipline," "a direct threat to the safety of the Republic and, above all, to the integrity of the structure of the state and its international relations," and even "a criminal offence."[28] Some non-signatories were suspended from their positions merely because they refused to join in an official campaign against Charter 77. In a letter of dismissal delivered to a young teacher, the Board of Education in the city of Českě Budejovice substantiated its action as follows: "Your attitude . . . raised doubts as to your ability to cope with your other obligations consisting in educating your pupils to become valuable and devoted members of socialist society."[29]

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25. *See* ILO BULL., *supra* note 20 at 52.

26. *Id.* For text of the 1960 Constitutional provisions, *supra* note 18.

27. Charter 77 Doc. No. 3 *in Violations of Civil and Political Rights in Czechoslovakia* 129 (Council of Free Czechoslovakia, Wash. D.C., 1977). *See also* WHITE PAPER, *supra* note 16.

28. ILO BULL., *supra* note 20 at 11-35.

29. *Id.* at 32.

In respect to both the individual petitions and the collective initiatives, the tendency in most East European states has been to divest the claims of their immediate external inspiration. In other words, the notion that the Helsinki Final Act or the International Covenants on Human Rights have created rights for the individual or that international agreements provide a legal basis for individual complaints or group demands vis-à-vis one's own government is dismissed. The perception that individual grievances based on international norms challenge the supremacy of state power is perhaps the dominant factor in government attitudes toward human rights movements. Governments want their societies to be dependent on their initiatives and to accept their interpretations of the scope and meaning of human rights. The Czechoslovak Federal Assembly, the supreme legislative organ, adopted in April 1977, a special resolution on the state of civil and political rights which provided that Czecholsovakia, "through its existing legal system fulfills all obligations deriving . . . from the ratified international conventions" and, in many instances, "goes beyond the scope of the rights expressed in them."[30] The same self-righteous position was taken a year later in a written report on the implementation of the International Covenant on Civil and Political Rights, submitted by the government to the Human Rights Committee.[31] It is plain that assertions contrary to this official position must invariably be perceived by the regime as deviant and hostile to its fundamental political and ideological tenets.

Although the International Covenants on Human Rights, as well as other human rights treaties signed and ratified,[32] have become part of the East European states' legal systems, and their provisions should therefore be directly enforceable in courts, no East European court has acknowledged their applicability in liti-

30. *Rude Pravo* (Prague), Apr. 6, 1977.

31. *See* Report submitted by Czechoslovakia under Article 40 of the International Convention on Civil and Political Rights, Doc. CCPR/C/1/add.12. *See also* the statement of the government representative before the Committee, January 27, 1978, Doc. CCPR/C/SR.64 at 2.

32. Among them, of particular importance in the present context are the Convention concerning Discrimination in Respect of Employment and Occupation (ILO, 1954), the Convention against Discrimination in Education (UNESCO, 1960), and the International Convention on the Elimination of All Forms of Racial Discrimination (U.N., 1966).

gation.[33] Individual claims that invoke these provisions are re-formulated by the court in terms of corresponding domestic laws. For example, in October 1979, six human rights activists were tried in Prague. The judge interrupted a defendant who referred to the International Covenants in his final speech and ordered the reference to be removed from the record of the court proceedings.[34]

Even more repugnant in the eyes of the government than public reference to international human rights standards is the idea that a group of private persons might organize a defense against infringements of its members' rights and communicate this purpose to others. This aspect of the "right to know and act" guaranteed by Principle VII is being totally rejected by the authorities in the East European countries. When communication with concerned and responsive groups abroad is involved, members of such groups may often be charged with criminal offenses.

The case of the Committee for the Defense of the Unjustly Prosecuted (VONS) in Czechoslovakia provides a good example.[35] A group of concerned citizens, most of them signatories of Charter 77, established the Committee in the spring of 1978, to monitor the cases of persons who were imprisoned or otherwise persecuted for their political beliefs in violation of international standards of human rights. The Committee issues reports and statements containing accurate information on actions taken by the authorities against such persons, sends observers to their trials and organizes support and relief for their families. In May 1979, a certain number of the members were arrested and charged with setting up,

> an illegal organization, the objective of which was to arouse mistrust and hostility against the socialist state system of the Republic and vilify it internationally by slanders that in Czechoslovakia citizens are being summarily and unlawfully prosecuted for their

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33. During the consideration of the Czechoslovak report in the Human Rights Committee, some members of the Committee specifically inquired whether any judgment based on the interpretation of the provisions had been handed down. *See* doc. CCPR/C/SR.64 at 13. The question was completely ignored by the government representative in his final comments. *See* doc. CCPR/C/SR.66 at 2-10.

34. See an account of the trial of Vaclav Havel *et alia* held in Prague in October 1979, by Wright *in* 2 *Zapad* (Toronto) No. 1 at 12 (Feb. 1980).

35. *See* Skilling, *Czech Human Rightists under Fire Again,* The Globe and Mail (Toronto), Aug. 24, 1979.

political views of religious convictions.[36]

The charge added, with ominous emphasis, that the defendants "carried out their criminal activity in collaboration with certain foreign representatives and institutions disseminating anti-Czechoslovak propaganda,"[37] and that "it has been adequately proved that foreign inflammatory propaganda against Czechoslovakia made full use of the materials obtained by the defendants and that all defendants agreed with this."[38] The trial of six selected members of the Committee, including the playwright Václav Havel, journalist Jiri Dienstbier and philosopher Václav Benda, took place in October 1979. Although the prosecution was not able to substantiate the charge that the accused had acted with the intent "to subvert the Republic," all six human rights activists were convicted and sentenced to several years of imprisonment.[39]

The Prague trial raised a cardinal issue of human rights protection under the Helsinki Final Act—that is, the right of people in the participating countries to organize citizen groups to monitor the actions of governments relating to the rights affirmed by the Final Act. Effective protection of human rights, particularly when an international obligation is to be carried out in the domestic context, depends to a great extent on public control of a government's compliance with its obligations. The influence of independent monitoring activities at many levels is therefore an essential condition in making the implementation of the Helsinki Final Act real and effective. Wide international support of groups clamoring for the implementation of the Final Act is not only appropriate as an expression of human solidarity but also fully justified, both morally and juridically. Such support is a logical extension of international concern for human rights. Its legitimacy is sustained by recent developments in the field which emphasize the role non-governmental actors play in promoting respect for human rights.

While the Helsinki Final Act has definitely strengthened the concept of people-to-people communication, it has left unanswered a number of questions: What channels of communication

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36. Quotation from the indictment (unpublished).

37. Amnesty International was specifically mentioned both in the indictment and during the proceedings.

38. Indictment, *supra* note 36.

39. 10 *Listy* (Rome), No. 1, Supp. 17-24 (1980).

are considered normal? What guarantees does the system provide to those who risk their personal security and freedom by making violations of human rights known to their fellow citizens and concerned persons in other participating countries? These problems warrant consideration at the Madrid Conference in 1980. Perhaps the Conference should call upon states which have not yet done so to create official monitoring bodies and to remove obstacles to the emergence and normal functioning of unofficial ones. Perhaps Basket III of the Helsinki Final Act should be supplemented by an understanding that trials involving persons who have been engaged in monitoring the human rights provisions of the Final Act should be open to observers from other participating countries.

The emergence of human rights diplomacy poses an interesting question: Would it be in keeping with the principles of diplomatic intercourse to shift the focus of human rights policy from governments to societies and thereby establish direct contacts with groups like Charter 77 in Czechoslovakia in order to help them gain visibility and recognition in their own countries? In this connection, it may be of interest to note that no rule of international law prohibits contacts between a foreign diplomatic mission and citizens of the receiving state; yet few embassies in the capitals of socialist countries seek contacts with human rights activists for fear they may arouse the host government's official displeasure. An incident relevant to the issue occurred in Prague in October 1978, when the Austrian ambassador invited several persons known for their association with Charter 77 to dinner. An article appeared in a Prague daily accusing the ambassador of "a gross violation of diplomatic privileges" allegedly committed by "conspiring with arch-enemies of socialism."[40] The daily carefully listed the "arch-enemies' " names.[41] It would probably be impractical to seek a formal understanding concerning the legitimacy of contacts between diplomatic representatives and host countries' citizenry on matters relating to the implementation of the Helsinki Final Act; rather, it should be left to practice. Existing precedents will undoubtedly continue to make inroads into the rigid patterns of the diplomatic protocol.

Human rights movements in Eastern Europe are generally

40. *Prace* (Prague), Oct. 18, 1978.

41. *Id.* The names include former Foreign Minister Jiri Hajek, playwright Pavel Kohout, artist Pavel Landovsky, artist Vlasta Chramostova, and singer Jaroslav Hutka, all prominent members of Charter 77.

spearheaded by those whose personal and collective destinies are tied to the removal of political repression, discrimination, and limitation of individual freedom.[42] The Charter 77 movement in Czechoslovakia, for instance, has grown out of the courageous protests of men and women who themselves were victims of the post-1968 persecution and whose moral motives for their action parallel their political ones.[43] They are aware of the limitations posed by the geopolitical and psychological factors involved in shaping collective attitudes in Eastern Europe today, and they refrain from actions which may give the governments an easy pretext for mass retaliation. They are part of the majority, yet they are singled out by the authorities because they are the more audible part. They differ among themselves as to the philosophical and political explanation of the human condition in their respective countries, but they are unanimous in their resolve to improve it. What holds them together is an ideology of human rights which is essentially pluralistic and which offers each individual a maximum freedom of choice. According to Soviet Professor Andrei Sakharov, "[P]recisely this kind of freedom, and not the pressure exerted by dogmas, authority, traditions, state power or public opinion, can insure a sound and just solution to those endlessly difficult and contradictory problems which unexpectedly appear in personal, social, cultural, and many other aspects of life."[44]

As can be expected, the governments use every available means to minimize the impact of the human rights movements on society in their countries. Branding the activists "renegades," "right-wing opportunists," "unrecognized pursuers of fame," and "failed counter-revolutionaries," they mount periodic campaigns designed to discredit the movements and isolate them from the rest of the society. They attack the human rights activists for trying to create the impression that "they represent what is almost a political movement" when in fact, "they are a small minority and have virtually no impact on the masses."[45] At the same time, the government-inspired campaigns warn against viewing detente and

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42. *Id.*

43. *See* Vaculik and Havel, *Controversy: Why Go to Jail?*, INDEX ON CENSORSHIP No. 5 (1979).

44. Sakharov, *The Human Rights Movement in the USSR and Eastern Europe: Its Goals, Significance, and Difficulties*, TRIALOGUE, No. 19 at 4 (1978).

45. Rude Pravo (Prague), Oct. 20, 1979.

the Helsinki process as a "blank check" which obliges the East European countries "to give wider scope for counter-revolutionary elements and to grant them the right to disrupt the socialist state."[46] Within the East European establishments, the hardliners lead the offensive. They praise the Soviet Union for setting an inspiring example for workers everywhere "by improving the lot of the people and ensuring equality, observance of human rights, and social justice, all of which only real socialism can provide," and they dissuade the population from supporting "those who seek to disrupt our socialist construction in any way in the interest, and with the backing, of foreign reactionaries."[47]

It has long been evident that the governments of the Soviet Union and other Warsaw Pact countries pursue a coordinated strategy in their suppression of human rights movements. The movements, until recently, had little contact with one another and no coordination of their efforts. An attempt by the Czechoslovak and Polish groups to establish regular contact and joint plans of action ended in the arrest in 1978 of Dr. Jaroslav Šabata, a spokesman for Charter 77. Despite intensified repression, however, there has been a noticeable increase in transnational cooperation. Mutually supportive exchanges and integration of activities among human rights activists, particularly in Czechoslovakia, Poland and the Soviet Union, have opened up a new chapter in the history of the East European dissident movement. In a November 1979 message addressed to Charter 77 and to the Polish Self-Defense Committee (KOR), Andrei Sakharov and other prominent members of the Soviet human rights movement called on those present "to come forward with a joint statement by human rights defenders in Poland, Czechoslovakia and the USSR, and to point out that a common approach to human rights exists in our countries."[48] Both Polish and Czechoslovak activists have agreed with the Soviet human rights defenders that the social and political structures of their respective countries have many common problems; they have declared their intention to "take part in endeavors which would identify those problems and indicate the possibility of their resolution."[49]

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46. *Id.*

47. Milos Jakes, Secretary of the Central Committee of the Czechoslovak Communist Party *in Rude Pravo,* Nov. 8, 1979.

48. 9 *Listy* (Rome), No. 6 at 15 (1979).

49. *Id.* at 15-16.

The development of cooperative initiatives by national dissident groups is of great significance for the future. Most past attempts to democratize the East European societies failed partly because they were confined to one single country each time. This strategy enabled the Soviet Union to isolate the hotbed and take appropriate measures to extinguish the movement without arousing much public outcry in other socialist countries. The situation may be different in the future because of increased individual interaction and increased responsiveness to universal human needs and aspirations. Even prior to the formation of the coalition and other direct links among the human rights movements, there was a high degree of consensus about the problems and needs of the East European societies. The unprecedented increase in contacts between individuals within the area in the last decade has undercut the isolation in which almost every East European society found itself in the 1950's and 1960's. It has also created a new kind of solidarity and commonality of interests which provides a natural basis for coordinated response to these problems and needs. In this process, the human rights groups play the role of a medium through which people in different socialist countries come to understand, recognize and act upon their individual and collective rights.

We must not forget the influence of independent information on the formation of the common conscience. This aspect of human rights activity consists of making violations of human rights known to as many citizens as possible, wherever they may occur, and in fostering continual public debate on ways and means to remedy the harms and prevent reoccurrences. For instance, the statements of Charter 77 on violations of human rights in the sphere of economic and social activity,[50] on violations of the right to work,[51] on discrimination and repression in the field of literature,[52] on discrimination against Czechoslovakia's Romany minority,[53] on restrictions of the freedom to travel,[54] and on economic problems bearing upon fundamental

50. Charter 77 Doc. No. 7, *supra* note 27 at 139-42 (Mar. 8, 1977).

51. Charter 77 Doc. No. 11, *supra* note 27 at 152-59 (May 30, 1977).

52. Charter 77 Doc. No. 12, *supra* note 27 at 159-63 (June 30, 1977).

53. Charter 77 Doc. No. 23, SUMMARY OF AVAILABLE DOCUMENTS, No. 11 at 2-4 (Palach Press 1979) (Dec. 1978).

54. Charter 77 Doc. No. 24, *id.* at 4-6 (Mar. 26, 1979).

rights of citizens[55] have provided valuable source material both for Czechoslovak citizens and for organizations abroad that support the human rights movements in Eastern Europe. The Committee for the Defense of the Unjustly Prosecuted (VONS) has issued approximately 150 reports on individual cases of persons who have been prosecuted or who have become victims of unlawful proceedings by the police and the judiciary because of their beliefs.[56] Through its efforts many violations of the fundamental rights of citizens which might otherwise have gone unnoticed have been brought to light.[57]

Although there are limits to what citizen groups can accomplish in terms of internal implementation of the Helsinki Final Act, their independent appraisals and judgments have tremendous moral and educational value. It can certainly be argued, although not conclusively proven, that in some instances governments may have heeded appeals from citizens groups, especially where substantial public outcry has followed exposure of a violation. Even if a government's response is negative, the issue has been raised before the public and is not going to go away.

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55. Charter 77 Doc. No. 26 (May 25, 1979).

56. These reports have been reproduced in bulletins issued in 1979 and 1980 by Palach Press Ltd., Press and Literary Agency, 19 Earlham House, 35 Mercer Street, London WC2 9QS.

57. One of the cases publicized by the reports was that of Josef Danisz, a Prague lawyer, who volunteered in 1977 and 1978 to defend several prominent signatories of Charter 77, including one of the original spokesmen for the movement, Dr. Jaroslav Šabata. Danisz's conscientious and fearless defense of his clients displeased the authorities who instigated criminal proceedings against him charging him with insulting public officials and slandering organs of the state. Not only was Josef Danisz excluded from the Prague City Association of Lawyers in March 1979, he was also brought to trial. The trial took place before the District Court in Hradec Králove on January 24, 1980. The public was excluded from the courtroom. Although Danisz pleaded not guilty and the charges against him were based on vague and contradictory evidence given by witnesses for the prosecution, he was convicted and sentenced to ten months imprisonment and to prohibition of activity as attorney for three years. As he has pointed out in his appeal, "the court deliberately curtailed his right to defense, particularly by not admitting evidence proving the truthfulness of those statements which the defendant had made in reality." Danisz's conviction has been widely regarded by the informed public opinion in Czechoslovakia as an act of retaliation for his attitudes as a defense counsel for human rights activists.

V. What Lies Ahead?

In Helsinki, the Soviet Union and the countries of Eastern Europe accepted, as a consequence of the comprehensive Final Act, the principle that human rights must effectively be observed, differences in internal structures of states notwithstanding. Can the international concern aroused by the agreement be sustained over a long period of time? Will the diplomacy of human rights, an expression of that concern, work, or will it be reduced to empty gestures? And most importantly, will not sudden reversals of policy on either the international or the domestic scene destroy the balance of interests embodied in the Helsinki system of human rights protection?

There are three basic viewpoints regarding the future of the Helsinki process and the possibility of improving the overall record of compliance with human rights in the context of East-West relationships. First, there is a cynical view. It anticipates more talk and little action, despite states' declared intentions. It holds that the fate of human rights can be read from the faces of the judges sentencing the dissidents to long terms in prison. It asserts that with the blossoming of what was hailed as detente, the East European governments were more than ever determined to crush dissent. While it may be sustained by facts, this assertion is not necessarily true, for it generalizes despair to such an extent that it leaves no room for future change.

Secondly, there is an alarmist view. Its proponents ask: As the repression grows larger and larger, as more and more individuals are directly affected by repressive measures, will intolerance eventually dominate all government-people relationships? It calls for forceful international action before it is too late. It visualizes the possibility of active intervention in the form of political and ideological crusades. It errs mainly by losing a sense of proportion and contact with reality. It is evident that, if translated into foreign policy, it would eliminate the very foundation on which the Helsinki Final Act is based.

There is, finally, a sanguine view. It tends to mirror the sentiments expressed by the participants of the Helsinki Conference and bases its hopes for progress on the prospects for gradual change in response to domestic activism and international incentives. This view certainly contains an element of truth. For one thing, people would not acquiesce voluntarily in the dismantling of the Helsinki system; and those directly threatened by a revival of the Cold War would fight harder than those with a more gen-

eral interest in the relaxation of tensions. Nor are the signatory governments likely to disrupt the operaton of the system, for the alternative is confrontation and insecurity for both the West and the East. Even if governments wished at some point in the future to forget about their signatures under the Helsinki Final Act, they would not be in the position to cancel its effect. The sheer strength of the belief of millions of Europeans, both from the East and the West, in the spirit and letter of the Helsinki Accord will make the consummation of the Accord an ever-present consideration in the minds of responsible statesmen.

We must not fall into the illusion, however, that the extension of human rights will occur as a mere consequence of the general process of relaxation of tensions. The aim must be actively pursued on both the domestic and international levels. The signatories of the Final Act must be prepared to accept the Helsinki undertakings as a whole, refusing to give any side an excuse for officially restricting or rejecting the process to the disadvantage of the individual, and encouraging any step—however small—toward the improvement of the human condition. While avoiding confrontation, it is essential to keep up permanent dialogue on all issues, old and new, that remain unresolved. Their solution lies in negotiations which will acquire momentum as concrete results are achieved. In this way, and in this way only, can the Helsinki process bring about the necessary change in the attitudes of the Soviet Union and other East European countries, whose apprehension of the international ambition to protect human rights has outlived the signing of the Helsinki Final Act.

Perhaps even a generation earlier it would have been inconceivable to raise the issue of human rights in the context of political negotiation between the East and the West. Five years ago the same states were able to reach some agreement on the issue. A realistic opportunity now exists to complete the task through domestic dialogue and international cooperation in the decade that lies ahead.

VI. Recommendations for the 1980 Madrid Review Conference

Many of the differences that accounted for the failure of the Belgrade Conference are still very much in evidence. They must be expected to emerge anew in Madrid when the participating States convene later this year to review implementation of the Final Act and define new tasks. It is essential to ensure that these

differences are not allowed to jeopardize the outcome of the Madrid Conference, because its failure would probably prove fatal to the Helsinki process as it was conceived.

What then should be done in Madrid with regard to human rights? Perhaps even more important than a criticism of particular violations is the need to instill a greater awareness of the relevance of human rights to the Helsinki process—which is synonymous with detente—and to make new arrangements for expanded coverage of both general and specific human rights issues. There must be a recognition that disrespect for human rights cannot create a climate of mutual trust and that human rights considerations are an essential component of the integrated approach to problems upon which peaceful and cooperative relations between the East and the West hinge. The aim should be not only to seek satisfaction of the most pressing humanitarian concerns but also to reaffirm the claim to a normal and permanent international interest in the security and welfare of the individual.

The areas in which additional agreement should be sought in order to enlarge the Helsinki consensus and to make the human rights provisions more effective, include the following:

A. *The Legal Status of the Helsinki Final Act*

Ever since the Helsinki Conference, the essential character of its product has been the subject of controversy. Most of the arguments center on the question whether or not the Final Act constitutes an international treaty legally binding its signatories. It should be noted that the document itself is rather vague on the question. Outwardly, it has the appearance of a treaty. Neither the process of its negotiation nor the way in which its principal provisions were drafted shows any notable departure from the usual method of treaty making. Nor does its appellation necessarily imply that something less than an international treaty was intended. As to its contents, very little suggests that it should be regarded as a mere letter of intent; its provisions lay down rules of conduct for common observance and plainly evidence a meeting of the minds of the parties over the obligations they were disposed to assume. Yet through a seemingly bizzare quirk in drafting, the signatories deflected assumptions about its treaty status by declaring that it was not eligible for registration as a treaty

under Article 102 of the U.N. Charter.[58]

The margin of uncertainty concerning the Final Act's legal status was further widened by a reference to "the high *political* significance which the participating States attach to the results of the Conference"[59] and by several delegations' statements extolling the paramount *political* value of the document. Only the United States delegation made it explicit that in its view the Final Act did not involve a "legal" commitment. Whether or not the consideration that an international treaty would have to be submitted to the Senate for its advice and consent prior to its acceptance was the sole motivation cannot be determined.[60] The fact remains, however, that in the subsequent periods the United States and other signatories have referred to the Final Act as if it constituted a binding agreement and have been invoking its various provisions in situations which call for legal assessment.[61]

On the Soviet side, there has been a tendency to distinguish between the legally binding nature of the Declaration of Principles and the recommendatory or programmatic character of other provisions encompassed by so-called Baskets I, II and III.[62] Most of the other signatories have remained non-committal insofar as the status of the Final Act is concerned.[63]

The "twilight existence" of the instrument in international law inevitably casts a shadow on the strength of the Helsinki system,

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58. *Final Act, supra* note 5, at Follow-Up § 4.

59. *Id.*

60. *See* Russell, *The Helsinki Declaration: Brobdingnag or Lilliput*, 70 AM. J. INT'L L. 247-48 (1976).

61. This conclusion can be inferred from the statements of the United States Government referring to obligations under the Final Act "imposed on all its signatories," to "the responsibility to review carefully the performance of all signatories," and to the fact that "implementation of the Final Act by any signatory is clearly a legitimate concern of all signatories." In recognition of its own obligation, "the Administration also gave renewed attention to examining implementation by the United States within its borders on matters within the jurisdiction of the Federal Government." *See* SIXTH SEMIANNUAL REPORT *supra* note 8 at 2-3.

62. *See, e.g.*, Grigelionis, *Concerning the Legal Nature of the Final Act of the 1975 Conference on Security and Cooperation in Europe* (in Russian), SOVIET Y.B. INT'L L. 167 (Moscow 1977).

63. Prévost, *Observations sur la nature juridique de l'Acte, Final de la Conférence sur la Securité et la Cooperation en Europe*, 21 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 142 (1975).

particularly in the field of human rights.[64] It is not unwarranted to expect that the parties themselves will prefer to treat the Final Act in a legal context, if for no other reason than because this provides them with the opportunity to talk legitimately with one another about concerns that would be difficult to voice in a political context. Why not, then, take a bolder step by giving the Final Act tacit or implicit recognition as a legally binding obligation? An understanding affirming the legal significance of the Helsinki Final Act could well be written into the consensus report of the Madrid Conference.

B. *Publicity for Human Rights*

Publicity, free public debate, and education are the media through which human rights can be better understood, and their denial, when it occurs, can be made known. It is therefore justifiable to say that they represent one of the essential modes of implementing the Final Act, in particular the provision concerning the right of the individual to know and act upon his or her rights and duties in the field. There are several aspects of this publicity issue which the Madrid Conference might consider. One is the need to encourage the widest possible dissemination of international instruments relating to human rights in the national languages of the respective countries. Although the text of the Helsinki Final Act itself has been widely publicized throughout Europe, the fact remains that the Soviet Union and some other countries of Eastern Europe have never published the Universal Declaration of Human Rights. In addition, copies of the full text of the International Covenants on Human Rights, to which all East European states are party, has been made available only in limited numbers. In view of the relevance of both documents to the implementation of the Helsinki human rights commitments, the Madrid Conference should endorse a recent resolution of the United Nations Commission on Human Rights which calls upon all governments to disseminate the above instruments in their respective territories.[65]

Another issue of concern is citizens' knowledge of all domestic normative acts which bear upon their fundamental rights and

64. *See* Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 300-01 (1977).

65. *See* U.N. Press Release HR/1936, Mar. 17, 1980.

freedoms. It should perhaps be agreed that all these acts must be made not only public but also generally accessible, otherwise they cannot be applied by the courts or administrative organs. It goes without saying that, like the laws and other regulations concerning the rights of the individual, lesser normative acts must also conform to established international standards. An understanding to this effect would help establish the authority of public human rights laws in those countries where they have to compete, often unsuccessfully, with a plethora of unpublished discriminatory rules and guidelines issued in complete disregard of the constitutional and international rights of the individual.

A third issue relates to the publicity of administrative decisions. Too often the administrative organs in East European countries impair the rights of citizens by refusing to divulge documents on which their decisions are based and, when acting on individual complaints, by failing to state the reasons for their acts. Perhaps the Madrid Conference should emphasize that the right to know and act upon one's rights presumes access to the documents on which a state organ bases its decisions and an explanation of the reasons for particular decisions. Where a decision is made affecting the rights of an individual, it should not be enough to assert that the action has been taken in the public interest, for it is also part of the public interest that individual rights be scrupulously observed. Obviously, this requirement is relevant to the Final Act, especially to the realization of measures envisaged in Basket III. What effect, for instance, would the family reunification provisions which require participating States to apply existing procedures for travel documents and visas in a positive and humanitarian spirit have if a citizen must be content with a stereotypical explanation that his application was rejected because "the trip is not in the state interest?"[66]

Finally, the Madrid Conference might be asked to endorse the decision of the U.N. Human Rights Commission calling on all governments concerned to safeguard "the right of . . . citizens and *groups of citizens* who endeavor to promote the respect for human rights."[67] This final issue concerns the activities of unoffi-

66. A Czechoslovak writer who had been denied travel permission on this ground ironically observed in his appeal: "I do not intend to travel in the state interest." He took the matter to the Minister of the Interior who acknowledged his wit and granted the appeal.

67. U.N. Press Release HR/1934, Mar. 17, 1980.

cial human rights groups which seek to foster a general public awareness of human rights in their country and to arouse public vigilance against their erosion. In this connection the Conference should endorse an interpretation of the right of the individual to know and act upon his rights, enunciated in Principle VII of the Helsinki Declaration, which confirms the right of a person to act in community with others.

C. *Status of Monitoring Bodies*

It is widely recognized that domestic monitoring activities are as important for a flawless implementation of the Final Act as is international scrutiny. In some participating States, official or semiofficial monitoring bodies have been created; in others, groups of citizens have assumed the role of informal commentators upon the conduct of their state in fulfilling its human rights obligations. Acknowledging the useful role of these bodies and groups, the Madrid Conference could perhaps declare that they are valuable complements to the existing implementation machinery and that as local outposts of the Helsinki system, they should enjoy protection. It would also be useful if the delegations would state publicly that individuals and groups of individuals that bring human rights violations to the attention of others at home or abroad are acting within their rights as recognized by the Helsinki Final Act.

D. *Human Contacts*

Recent international events are raising the painful possibility that the provisions of Basket III, once the centerpiece of the Final Act, may well be on their way to oblivion. In order to arrest these developments, it is appropriate to upgrade Basket III by clarifying and further elaborating on its provisions.

First, it should be made clear that the provisions of Basket III add to, not detract from, the rights recognized in Principle VII of the Declaration of Principles Guiding Relations between Participating States. For instance, when Basket III enjoins states to ease existing restrictions on travel, it takes into account their obligation to respect each individual's liberty of movement and freedom to choose his or her own residence. While recognizing that states may lawfully limit that freedom under certain conditions, Basket III aims at narrowing the areas in which states can lawfully impose restrictions on the exercise of the right. Basket III, therefore,

does not contradict Principle VII or the Covenant on Civil and Political Rights. It should also be made clear that the concept of incremental, step-by-step improvement adopted by Basket III is not applicable to the fundamental rights protected under Principle VII or the Covenants. Those rights require immediate and full implementation.

Secondly, in appraising the strength and deficiencies of Basket III, the Madrid Conference should take into account the need for clarifying those provisions which have given rise to different interpretations in practice. For instance, it is desirable to agree upon a common definition of "family" for the purpose of determining those individuals affected by the provisions promoting contacts between the reunification of families. It should be agreed, furthermore, that contacts between people, dissemination of information, and cultural and educational exchanges will be furthered without discrimination as to race, sex, language, religion, social status, political affiliations, or opinions of the persons involved in such exchanges. Any person whose request for requisite permission has been rejected should be entitled to know the reasons for the rejection; again, it should not be enough to assert that the action has been taken in the public interest. Since human contacts and exchanges often reflect the state of bilateral relations between the governments concerned, which amounts to discrimination based on criteria extrinsic to the purpose of human contacts, it would be desirable to set forth an agreed principle that all participating countries shall enjoy, for the purpose of human contacts and exchanges, equal status.

E. *Information*

Agreement on guarantees against unacknowledged interception of books, periodicals, and other publications mailed to individuals from abroad would be a welcome development.[68] Generally, there is a need for relaxation of censorship of both domestic and foreign publications. For this purpose, the Madrid Conference should try to define in general terms the notions of "national security," "public policy," and "public safety" so often invoked by some governments as legal grounds for excluding certain kinds of publications from circulation. An international pool of publications by

68. Perhaps the Universal Postal Union might be asked to arrange such an agreement.

major publishers from the participating countries could be created and a representative sample of the publications could be permanently displayed in major cities of the participating States. The books and publications could be made available to the interested public in reading rooms or on short-term loans.

F. *Culture, Education, and Science*

It seems appropriate to reaffirm the principle that works of art, culture, and science are the sole property of their individual creators (unless freely ceded to another) and that state authorities cannot prevent authors from publishing or disseminating their work in other countries. States should be requested to abrogate laws and regulations which discriminate against authors who publish or present their works abroad without their state's authorization. States should agree upon principles concerning the rights and duties of individuals participating in cultural, educational, or scientific exchanges, with a view toward eliminating irrelevant and discriminatory criteria applied by some states.

G. *Solution of Common Problems*

Focusing on cooperative action, the multilateral process is an appropriate framework for continuing exchanges of views. Spurred by periodic follow-up conferences, all signatories theoretically should be striving for the solution of outstanding problems concerning the implementation of the Final Act. Meetings of experts are specifically mentioned in the Final Act as a medium of such exchange among the participating States.

A topic on which signatories could be invited to exchange views and solve possible discrepancies is national legislation concerning acquisition and loss of nationality. Another issue which legal experts might fruitfully discuss is domestic application of Article 14 of the International Covenant on Civil and Political Rights concerning fair trial.[69] The Madrid Conference could also encourage

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69. Article 14 sets forth the following requirements:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security

states to insert into bilateral consular treaties and agreements on cultural cooperation, as well as into other relevant treaties, clauses which reaffirm the provisions of Baskets II and III and

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in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(*a*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*b*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*c*) To be tried without undue delay;

(*d*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(*e*) 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 the witnesses against him;

(*f*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*g*) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Covenant on Civil and Political Rights, *supra* note 4.

provide for their implementation. Finally, a special international conference could be considered to discuss the question of "new" rights not included in the Universal Declaration and the International Covenants.[70] These rights should be defined in terms of individual claims and in terms of their bearing upon established rights.

The recommendations suggested for the Madrid Conference agenda provide an opportunity for constructive discussion of human rights issues. Their adoption would greatly strengthen the hand of those in East European countries who rely on the Helsinki Final Act in their struggle for individual rights.

70. There have been proposals to move beyond the civil and political and the economic, social, and cultural rights recognized in the Universal Declaration and the International Covenants toward gradual international acceptance of a "third generation of rights." The third generation would include the rights to peace, development, and the common heritage of mankind, such as the right to be protected against pollution of the environment. *See International Group Urges Peace as a Human Right*, N.Y. Times, Aug. 27, 1979 (an account of the Armand Hammer Conference of the International Institute of Human Rights, Campobello Island, New Brunswick, Aug. 1979).