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The Relation of the Helsinki Final Act to the Emigration of Soviet Jews

"There are no internal affairs left on our crowded earth! Mankind's sole salvation lies in everyone making everything his business."

— Alexander Solzhenitsyn

American concern about the emigration of Soviet Jews has proven to be a major obstacle in the path of detente. Plans ranging from ballet performances to trade negotiations have suddenly been derailed by outbursts of public indignation in the United States over the plight of Soviet Jewry. One event that was not so obstructed was the signing of the Final Act of the Conference on Security and Cooperation in Europe (CACE)¹

Both East and West agreed that it was an event of great significance, for it provided a distinct framework through which the policy of detente could be implemented and evaluated.² However, there is little agreement as to what legal impact the Act should have upon the emigration policies of the USSR. The West claims that the Helsinki accord commits the Soviet Union to an easing of restrictions. This contention is generally based

¹ Full text of the CSCE Final Act has been reproduced in 73 DEPT. STATE BULL. 323 (1975).

² President Ford has described the goals of the Final Act as the yardstick by which the success of detente was to be measured. 73 DEPT. STATE BULL. 305 (1975). For the statements of Warsaw Pact leaders see *Hearings on H. Res. 864 and H.R. 9466 (S.2679) before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94th Cong., 1st & 2nd Sess., at 15 (1975-76).*

upon the Act's human rights and contracts sections.³ The USSR not only denies this interpretation, but asserts that the Act's non-intervention provisions⁴ prohibit the West from interposing itself into what the Soviets claim is a purely domestic affair.⁵ This "intervention" dispute runs throughout the broad spectrum of East-West human rights concerns.⁶

Despite the wide scope of these concerns, this study shall focus upon the relatively narrow issue of the emigration of Soviet Jews. This narrow focus serves several functions. First of all, the ability to emigrate is often vital to the effective exercise of other rights.⁷ Secondly, this issue is probably the most "solvable", as it does not present an inherent threat to the Soviet system that would permanently alter the status quo.⁸ Thirdly, the emigration provisions of the Final Act — unlike most other humanitarian pledges — are especially significant in that their

³ See complete text, notes 23 & 24, *infra*.

⁴ See complete text, note 23, *infra*.

⁵ The USSR recently went so far as to charge Belgium with a direct and unequivocal violation of the Helsinki accord by having allowed an international conference on Soviet Jewry to be held on its territory. See Ryzhov, *Slander Fair; Zionist Confab in Brussels*, *Izvestia*, Feb. 17, 1976, at 3; reprinted in XXVIII CURRENT DIGEST OF THE SOVIET PRESS 7, at 18.

⁶ *Id.*

⁷ In his classic work on *The Right of Everyone to Leave any Country, Including His Own*, Jose Ingles asserted that in the absence of the right to emigrate,

"it may be impossible to realize such other rights as the right to life, liberty and security of person; the right to the nationality of one's choice; the right to marry, to found a family; the right to freedom of expression, including the right to seek and transmit information and ideas regardless of frontiers; the right to freedom of assembly and association; the right to work; the right to rest and leisure; the right to an adequate standard of living; or the right to education."

Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave His Country*. U.N. Doc. E/CN.4/Sub a/229/Rev I (1963).

⁸ It is unlikely, for example, that the Kremlin will agree to any measures which would undermine its monopoly of political power. While yielding to dissident demands for the alleviation of censorship would inevitably weaken central authority, the departure of a portion of Soviet Jewry would not so alter the internal situation. For an analysis of the problems involved in the external promotion of democratic freedoms in authoritarian states such as the USSR, see Shulman, *On Learning to Live with Authoritarian Regimes*, 55 FOREIGN AFFAIRS 334 (1977). Shulman contends that the West should pragmatically set its priorities in accordance with what it calculates that the USSR would accept. He advises that any threat to the state's monopoly of power would be doomed.

implementation is capable of being quantitatively measured.⁹ Although other Soviet dissidents have also encountered emigration obstacles, the emigration of Soviet Jews is especially conducive to this quantitative measurement. This amenability is due to the fact that the Jews constitute the only large, readily identifiable group trying to leave the country.¹⁰ Furthermore, the obstruction of their emigration is more readily attributable to Soviet obstinacy, than it is in regards to those Gentiles who wish to leave. For example, Jews are guaranteed visas to Israel, while Gentile dissidents are often denied entry to Western nations. This is due to the rigid immigration quotas of the latter. The inhibiting effect of these Western restrictions upon those dissidents allowed to emigrate cannot be attributed to the Soviet authorities.¹¹

Unlike the Gentiles however, the Jewish emigration situation is complicated by the added factor of anti-Semitism. Although this bias has often been attributed to Soviet authorities by Jewish leaders,¹² this study shall not deal with this rather complicated issue as it does not bear directly upon the emigration problem. While equality of rights and privileges for all Soviet minorities are mandated by the Constitution of the USSR, a greater percentage of Jews are being allowed to leave than are any other minority group.¹³ Furthermore, Jews are the best

⁹ Commission on Security and Cooperation Europe, REPORT OF THE STUDY MISSION TO EUROPE TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE 58-59 (1976).

¹⁰ It has been estimated that as many as two thirds of the 2.5 million Jews in the USSR would eventually emigrate in the absence of the current restrictions. More than 130,000 Jews in possession of Israeli visas have not yet had their emigration applications acted upon by Soviet authorities. Roughly one thousand families have already been relegated to the status of "refusniks." L. SCHROETER, *THE LAST EXODUS* 376 (1974); *Hearings before the Subcomm. on International and Military and Political Affairs, supra* note 2, at 34, 80.

¹¹ For a discussion of these Western restrictions, see Browne, *Many Refugees Find West's Barriers High*, N.Y. Times, Feb. 17, 1977, at 14, col. 1.

¹² For a discussion of anti-Semitism in the USSR as it relates to the Russian criminal justice system and the emigration problem, see T. TAYLOR, *COURTS OF TERROR: SOVIET CRIMINAL JUSTICE AND JEWISH EMIGRATION* (1st ed. 1976).

¹³ Constitution of the U.S.S.R., Article 123; Constitution of the R.S.R.S.R., Article 127.

educated minority in the Soviet Union and enjoy professional prominence well out of proportion to their percentage of the total population.¹⁴ However the cost of this scholastic and professional success is often cultural assimilation. Also, unlike other minorities, the Jews do not have their own homeland within the USSR in which to nourish their unique heritage. Emigration is thus seen as the price of maintaining this cultural identity.

This study will briefly trace the opposing policies of the East and West from the origins of the CSCE to their embodiment in the text of the Final Act. The legal status and effect of the Act under international law will then be addressed, particularly as it relates to previous human rights accords. The recurring problem of what constitutes intervention in another state's internal affairs will then be analyzed. Some possible conflicts between the Final Act and specific elements of Soviet law will then be identified. Finally, an evaluation of the efficacy of the Act will be given, along with suggestions for its further implementation.

I. DEVELOPMENT OF THE EMIGRATION ISSUE WITHIN THE CONTEXT OF THE CASE

A. *History of the CSCE*

The conflicting interpretations of the Final Act with respect to the emigration of Soviet Jews can be traced to the origins of the CSCE itself. The USSR first proposed a Conference on European Security in 1954.¹⁵ The purpose of such a conference was to secure Western recognition of the post-war territorial boundaries and Soviet spheres of influence. The Western alliance rejected the proposal claiming that it had little to gain from such a conference.¹⁶ The West was also aware of the

¹⁴ 65 DEPT. STATE BULL. 662 (1971).

¹⁵ Russel, *The Helsinki Declaration: Brobdingnag or Lilliput?* 70 AJIL 244, n. 12 (1976).

¹⁶ Povolny, *The Soviet Union and the European Security Conference*, XVIII ORBIS 202 (1974).

propaganda pitfalls inherent in the plan.¹⁷ The Warsaw Pact renewed the call for a conference in its Bucharest Declaration of 1966. This proposal expanded the proposed scope of the meeting to include the increase of intellectual, technical, and cultural cooperation. While Western Europe was receptive to the expanded proposals, the United States remained skeptical.¹⁸ This uncertainty was enhanced by the 1968 Czechoslovakian invasion. Nonetheless, in 1969 the Western Alliance gave its first favorable response to the idea of a CSCE in the Brussels Declaration.¹⁹

The Declaration's provisions generally paralleled those of the Bucharest Declaration with respect to cooperation in the above fields. However this statement of the Western Alliance's position went beyond the scope of the communist proposals in certain other areas. It included proposals on self-determination, non-intervention in the internal affairs of other states,²⁰ and the freer movement of people and ideas. This was the first instance of such matters having been brought up within the context of a CSCE, thus providing a linkage between the resolution of national security matters and humanitarian issues. The Declaration clearly indicated that past communist performance in these areas was unacceptable to the West.²¹ The Brussels statement precluded any "real and lasting improvement in East-West relations in the absence of a common interpretation of these principles . . . without any conditions or reservations."²² The Soviets reacted indignantly to the human rights proposal, castigating it as "an attempt at intervention in the domestic affairs of the socialist countries, to confront them with such terms for the

¹⁷ *Id.*

¹⁸ Russel, *supra* note 15, at 244.

¹⁹ *Id.*

²⁰ The non-intervention and self-determination proposals of the West were mainly directed at Soviet interventionism in Eastern Europe, such as the Czechoslovakian invasion of 1968. For a discussion of the conflicting interpretations of the non-intervention and self-determination provisions of the Final Act, see Section III of this article, *infra*.

²¹ North Atlantic Council: Future Development of East-West Relations, DECLARATION OF THE NORTH ATLANTIC COUNCIL (Dec., 1969).

²² *Id.*

talks which rather resemble their direct wrecking."²³ Despite the hostile communist reception of the Brussels Declaration, the Warsaw Pact reaffirmed the Bucharest Declaration with the Budapest Memorandum of 1970, and further proposed that the CSCE be succeeded by some kind of permanent implementation machinery.²⁴

As a result of the Nixon-Breshnev summit of 1972, the initiation of a CSCE was linked to the establishment of Mutual and Balanced Force Reduction negotiations. By this time, the most serious European security problems had already been settled by treaties relating to Berlin and the German-Polish border.²⁵ Despite continued Western insistence upon the inclusion of humanitarian issues, preliminary CSCE talks commenced in September, 1972. During these negotiations there was a major conflict between the promotion of human rights by the West and the preservation of sovereign rights and prerogatives by the Soviets.²⁶ As a result of textual compromises which shall be subsequently indicated, the Final Act was signed by the leaders of thirty-five nations during ceremonies in Helsinki on August 1, 1975.²⁷

B. *Structure of the Final Act*

The conflicting positions and priorities that were evident in the origins and exhausting negotiations of the CSCE are also reflected in the Final Act. It contains language which can be used to justify the positions taken by either the Soviet authorities or those supporting the unobstructed emigration of Soviet Jews.

²³ Yermakov, *NATO Designs*, Pravda, Oct. 10, 1972; see Povolny, *The Soviet Union and the European Security Conference*, XVIII ORBIS 223 (1974).

²⁴ Russel, *supra* note 15.

²⁵ Federal Republic of Germany-USSR Non-Aggression Treaty, 9 ILM 1026 (1970); Federal Republic of Germany-Poland: Treaty Concerning Basis for Normalizing Relations, 10 ILM 127 (1971); Quadripartite Agreement on Berlin, 10 ILM 895 (1971).

²⁶ REPORT OF THE STUDY MISSION, *supra* note 9, at 29, 33.

²⁷ Russel, *supra* note 15, at 244-47

1. *Format*

The Act is basically divided up into three sections termed "Baskets". Basket I deals primarily with questions relating to security in Europe. It is framed by a "Declaration on Principles Guiding Relations between Participating States" (Guiding Principles) which sets forth the basic norms which are to sovereign the implementation of the remainder of the Act. Of special relevance to the emigration issue are Principle VI concerning non-intervention in the internal affairs of other states and Principle VII which calls for the promotion of and respect for human rights and fundamental freedoms.²⁸ The remainder

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VI. *Non-intervention in internal affairs*

The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.

They will likewise in all circumstances refrain from any other act of military or of political economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.

VII. *Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief*

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

They will promote and encourage the effective exercise of civil political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

of Basket I deals with military matters. Basket II covers co-operation in the fields of economics, science, technology, and the environment. Basket III is divided into four sections which deal with human, informational, cultural, and educational contacts. Basket III's provisions for cooperation in humanitarian and other fields have proven to be the most controversial of the Act.²⁹

They will constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in co-operation with the United Nations to promote universal and effective respect for them.

They confirm the right of the individual to know and act upon his rights and duties in this field.

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights by which they may be bound.

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1. Human Contacts

The participating States,

Considering the development of contacts to be an important element in the strengthening of friendly relations and trust among peoples.

Affirming in relation to their present effort to improve conditions in this area, the importance they attach to humanitarian considerations.

Desiring in this spirit to develop, with the continuance of detente, further efforts to achieve continuing progress in this field.

And conscious that the questions relevant hereto must be settled by the States concerned under mutually acceptable conditions.

Make it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating States, and to contribute to the solution of the humanitarian problems that arise in that connexion.

Declare their readiness to these ends to take measures which they consider appropriate and to conclude agreements or arrangements among themselves, as may be needed, and

Express their intention now to proceed to the implementation of the following:

(a) *Contacts and Regular Meetings on the Basis of Family Ties*

In order to promote further development of contacts on the basis of family ties the participating States will favourably consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis if desired, in order to visit members of their families.

Applications for temporary visits to meet members of their families will be dealt with without distinction as to the country of origin or destination, existing requirements for travel documents and visas will be applied in this spirit. The preparation and issue of such documents and visas will be effected within reasonable

The section of the Final Act which deals with human contacts bears most directly upon the Jewish emigration problem. As a signatory to the Act, the USSR pledges in this section to facilitate "freer movements and contacts, individually and collectively, whether private or officially, among persons, institutions, and organizations," as well as to seek the solution of related humanitarian problems. Basket III goes on to indicate specific areas in which the signatories are expected to cooperate. These areas include the acceleration of the processing of emigration applications,³⁰ the lowering of related fees,³¹ the prompt reconsideration of renewed applications,³² and the preservation of the rights

time limits, cases of urgent necessity such as serious illness or death will be given priority treatment. They will take such steps as may be necessary to ensure that the fees for official travel documents and visas are acceptable.

They confirm that the presentation of an application concerning contacts on the basis of family ties will not modify the rights and obligations of the applicant or of members of his family.

(b) 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.

They will lower where necessary the fees charged in connexion 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.

Persons whose applications for family reunification are granted may bring with them or ship their household and personal effects, to this end the participating States will use all possibilities provided by visiting regulations.

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

The participating States will support the efforts of Red Cross and Red Crescent Societies concerned with the problems of family reunification.

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.

³⁰ 73 DEPT. STATE BULL. 340 (1975).

³¹ *Id.*

³² *Id.*

of the applicant.³³ A special priority is given to the reunification of families through emigration.³⁴

2. *Comparative Importance of the Act's Sections*

International law does, of course, recognize a distinction between the recognition to be given to those terms which are related to the main object of an agreement and those which are not.³⁵ If a term is not related to the main object, a breach of this minor provision need not be considered a serious violation of the agreement.³⁶ The Soviet Union has consistently stressed Basket I's provisions for the inviolability of frontiers and non-intervention in the internal affairs of other states over the human rights provisions. The Soviets view the human rights provisions as being quite secondary to what they consider to be the main object of the CSCE, which was that it provide a surrogate peace treaty for World War II. This was to preserve the political status quo in Eastern Europe, while Moscow simultaneously expanded its contacts with the West. In the Russian view, the Western emphasis upon Basket III threatens to alter this status quo by using the CSCE to place humanitarian issues firmly upon the agenda of detente.

The West has stressed the humanitarian provisions over the others. While it does not question the importance of Basket I and II, it considers them to be either self executing or at least non-controversial. In contrast, the West views the Basket III provisions as being consistently violated by the Eastern bloc. Therefore, it feels that these abused humanitarian principles are in need of special protection.³⁷

It is submitted that while Basket I may be more compatible with Moscow's interests, the Soviet government cannot write off Basket III as mere surplusage. The terms of the Act firmly ne-

³³ *Id.*

³⁴ *Id.*

³⁵ J.L. BRIERLY, *THE LAW OF NATIONS* 328 (6th ed. 1963).

³⁶ *Id.*

³⁷ Russel, *supra* note 15, at 243-44, *REPORT OF THE STUDY MISSION, supra* note 9, at 5-9.

gate any attempt to selectively implement its provisions. The preamble to the Final Act specifically recognizes the importance of the "promotion of fundamental rights" and "well being for all peoples." Any attempt to subordinate these provisions to the elevation of Basket I directly contradicts Principle X of the Guiding Principles which asserts that:

All the principles set forth above are of primary significance and accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.

While the CSCE may have been initially proposed to deal with those issues embodied in Basket I, subsequent events expanded its focus.³⁸ Western insistence upon the inclusion of humanitarian issues and the length of the subsequent negotiations on them certainly indicate at least the tacit acceptance of the Eastern bloc to their inclusion as an important part of the agreement.³⁹ Their relative significance is enhanced by the fact that most of Moscow's immediate Basket I goals had already been effectively achieved well before the CSCE through the signing of agreements relating to Germany.⁴⁰ Therefore, since Basket III is a material part of the Helsinki accord, the USSR cannot selectively exclude its provisions from implementation. To completely disregard Basket III the Soviet Union would have to question the legal efficacy of the entire Final Act.

II. LEGAL NATURE OF THE FINAL ACT.

A. *Status Under International Law*

The Final Act fundamentally embodies political and moral commitments, rather than legal ones.⁴¹ Accordingly, the Soviet Union can rightfully claim that the Basket III provisions are not binding upon them. While it is not impossible for a "Final

³⁸ See discussion in section I of text, *supra*.

³⁹ See REPORT OF THE STUDY MISSION, *supra* note 9, at 32.

⁴⁰ Russel, *supra* note 15, at 245-46.

⁴¹ REPORT OF THE STUDY MISSION, *supra* note 9, at 30.

Act" to be legally binding,⁴² the wording of the document and the general intention of the Conference delegates strongly mitigate against such an interpretation. The participants made relatively vague commitments by declaring their "resolve" and "intentions" to "pay due regard to and implement the Final Act." To underscore their intention that the Act not be legally binding, the closing paragraphs state that "it is not eligible for registration under Article 102 of the United Nations Charter." This ineligibility thus prevents any signatory from invoking the agreement "before any organ of the United Nations," such as the International Court of Justice or the United Nations Human Rights Commission.⁴³ Furthermore, the Act is not subject to ratification by national legislatures, which prevents the attainment of legally binding force in many nations.⁴⁴

Still these dilutions of the legal power of the Act were not inserted as a Soviet attempt to undercut its humanitarian pledges. Despite Basket III's politically embarrassing provisions, the Soviet delegation consistently opposed the insertion of terms which tended to dilute the legal force of the Act.⁴⁵ They were understandably reluctant to undermine the status of a document representing the fruition of more than twenty years of their diplomatic efforts. In contrast, the Nixon and Ford administrations favored the inclusion of such terms, due to Congressional pressure over its tendency to conclude important international agreements without Congressional approval.⁴⁶

On the more positive side in terms of legal efficacy, the signatories did recognize the Act's high political significance, stating that:

in exercising their sovereign rights, including their laws and regulations, they will conform with their legal obliga-

⁴² (Example of a binding Final Act) Final Act of the Extraordinary Administrative Radio Conference to Allocate Frequency Bands for Space Radio Communication Purposes, Nov. 8, 1963, 15 UST 887, TIAS No. 5603.

⁴³ BRIERLY, *supra* note 35, at 324-25.

⁴⁴ Mojsov, *Europe and the World After Helsinki*, XXVII REVIEW OF INTERNATIONAL AFFAIRS 621 (Feb. 20, 1976) at 6.

⁴⁵ RUSSEL, *supra* note 15, at 246-47.

⁴⁶ REPORT OF THE STUDY MISSION, *supra* note 9, at 20.

tions under international law; they will furthermore pay due regard to and implement the provisions in the Final Act of the Conference on Security and Cooperation in Europe.⁴⁷

The parties to the Act also committed themselves to make further unilateral and bilateral efforts to achieve the aims of the CSCE, and to utilize the appropriate forms set forth in the Act.⁴⁸ While these political pledges are not legally binding, they are still important. In view of the number of nations and leaders involved, many Eastern jurists have even claimed that the Final Act constitutes a special kind of collection of sui generis legal norms.⁴⁹ It is anticipated that these norms are likely to become an important source of customary international law.⁵⁰ Therefore, it is unlikely that the Soviets will generally denigrate the legal status of the document to justify their evasion of Basket III obligations.⁵¹

B. *Relation to Previous Human Rights Accords*

The Act is in accordance with international law and reaffirms the commitment of the signatories to a number of widely recognized international accords. Principle VII of the Guiding Principles specifically commits the states to "act in conformity with the purposes and principles" of the United Nations Charter, the Universal Declaration of Human Rights,⁵² and the International Covenants on Human Rights.⁵³ They are also to fulfill their obligations as stated in other "international declarations

⁴⁷ 73 DEPT. STATE BULL. 326 (1975).

⁴⁸ *Id.* at 348.

⁴⁹ Vukadinovic, *Europe Between Helsinki and Belgrade*, XXVII REVIEW OF INTERNATIONAL AFFAIRS 635 (Sept. 20, 1976), at 9.

⁵⁰ Erickson, *Soviet View of the Legal Nature of Customary International Law*, 7 CASE W. RES. I. L. REV. 164 (1975).

⁵¹ See Breshnev, *One Year After Helsinki*, XXVIII THE CURRENT DIGEST OF THE SOVIET PRESS 30, Aug. 25, 1976, at 10.

⁵² Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71-7 (1948).

⁵³ International Covenants on Civil and Political Rights, G.A. Res. 2200 (XXI), GAOR, 21st Sess., Supp. 16, U.N. Doc. A/6316 (1966).

and agreements by which they may be bound" in the field of human rights and fundamental freedoms.⁵⁴

An analysis of these reaffirmed accords serves three primary functions. First of all, the terms of these international agreements are recognized as valid municipal law in the USSR. Since there are no conflicting domestic laws directly relating to the right to emigrate, these international accords are especially relevant. Soviet law further asserts that even if there is conflicting domestic law, the international accords shall prevail.⁵⁵ Secondly, these agreements may indicate what affect Basket III will ultimately have upon the Kremlin. Since Soviet authorities claim that their citizens already enjoy rights at least as great as those afforded under the international pacts, they have claimed that they are not obligated to alter their practices to meet these international standards.⁵⁶ Therefore, unless the Helsinki accord represents a unique step beyond its predecessors, there is little reason to expect the USSR to alter its practices to meet the Act's requirements. Finally, these agreements may provide additional vehicles for those using the Final Act as a means of pressuring Moscow on the emigration issue.

1. *The United Nations Charter*

The Charter of the United Nations is the most frequently cited accord in the Final Act. The Act affirms the supremacy of the U.N. Charter over all other treaties or agreements.⁵⁷ This is consistent with the high regard shown to the Charter by the USSR and in the field of international law generally.⁵⁸

⁵⁴ 73 DEPT. STATE BULL. 325 (1975).

⁵⁵ Art. 129 of the Fundamental Principles of Civil Legislation for the U.S.S.R. and the Union Republics; Art. 64 of the Principles of Civil Legal Procedure. Yet this factor is tempered by the Civil Code which withdraws its protection from those rights whose "enjoyment contradicts the purpose of these rights in a socialist society building communism." See B. RAMUNDO, PEACEFUL COEXISTENCE: INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM 40-1 (1967).

⁵⁶ Kudryavtsev, *The Truth About Human Rights*, 5 HUMAN RIGHTS 197 (1976).

⁵⁷ 73 DEPT. STATE BULL. 326 (1975).

⁵⁸ G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 80-1 (1974).

Soviet jurists credit it with the introduction of the principle of respect for basic human rights into international law, along with the imposition of corresponding duties on states.⁵⁹ They maintain that it is more than a treaty, for it is an important source of customary law due to the character of the Charter and its crucial role in inter-state relations.⁶⁰

The preamble of the Charter affirms "faith in fundamental human rights, in the dignity and worth of human person." Article 1(3) goes on to stress the importance of "promoting and encouraging respect for human rights and fundamental freedoms for all." Articles 55 and 56 obligate individual members to take joint and separate action to further these ends. However, the Charter offers only limited protection to these rights and freedoms, as it does not specify what they are. Furthermore, Article 2(7) provides an escape clause in that it forbids U.N. intervention in "matters which are essentially within the domestic jurisdiction of the State."⁶¹ Since the USSR maintains as a general rule that only states, and not individuals, can be subjects of international law, this clause frequently is invoked to obstruct any foreign expressions of concern over Soviet human rights policies.⁶²

2. *The Universal Declaration of Human Rights*

The Universal Declaration of Human Rights sought to clarify just what the protected human rights and fundamental free-

⁵⁹ *Id.*

⁶⁰ This importance is attributable to the Charter: (1) providing the legal basis for a global organization for peace and security (2) being given pre-eminence over all other treaties by U.N. members (3) binding non-members to its principles as expressions of customary law. See Erickson, *supra* note 50, at 164-66.

⁶¹ For a discussion of the interpretation and application of Article 2(7) in the human rights area, see SOHN & BURGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 642-55 (1973).

⁶² The USSR has criticized the airing of Soviet emigration cases in the General Assembly in accordance with the provisions of Article 10. Even the distribution of documents critical of Moscow's policies is attacked as a violation of the Charter. See *id.*, at 839. However the Soviet Union has not hesitated to use this forum to attack the human rights policies of other members, such as South Africa. See *The Case of Russian Wives*, 3 (pt. 1) GAOR, C. 6 at 718-81.

doms were.⁶³ It unequivocally stated in Article 13(2) that, "everyone has the right to leave any country, including his own," and further asserts in Article 15 the right of everyone to maintain or change his nationality if he so desires.⁶⁴ The USSR objected to these articles from the moment they were first proposed on grounds that they might encourage emigration.⁶⁵ It proposed an amendment to the articles which would protect the rights only if they were exercised "in accordance with the procedures laid down in the laws of that country." The amendment was rejected, however, as were several others proposed by the Soviets.⁶⁶ Although these attempts proved unsuccessful, the Soviet Union has been able to invoke Article 29(2) to justify its narrow interpretation of the emigration rights as it exempts those which are "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order, and the general welfare in a democratic society."⁶⁷ As will be subsequently developed, these exemptions can be easily exploited.⁶⁸

The Soviet Union abstained when the Declaration was passed by the General Assembly. Its primary objection was that the "purely theoretical character" of the Declaration did not sufficiently delineate the means for the observation of these rights.⁶⁹ Despite its abstention, the Soviets have consistently proclaimed their support of the Declaration.⁷⁰ Although it was originally non-binding, the Declaration has acquired increased interna-

⁶³ See SOHN & BURGENTHAL, *supra* note 61, at 514-16.

⁶⁴ Full text reprinted in 43 AJIL Supp. 127 (1949).

⁶⁵ 3 U.N. GAOR, Pt. I/3rd Comm. 358 (1948).

⁶⁶ Pettiti, *The Right to Leave and to Return in the U.S.S.R.*, 5 ISRAEL Y.B. ON HUMAN RIGHTS 274 (1975).

⁶⁷ Article 29(2) also prohibits any actions which may be used to inhibit the exercise of these rights. Also see Articles 10, 29, and 30 of the Universal Declaration of Human Rights.

⁶⁸ See section IV-C of text, *infra*.

⁶⁹ U.N. Doc. E/CN.4/SR.49, at 6-12 (1948); 3 U.N. GAOR 925 (1948).

⁷⁰ Knissbacher, *Aliyah of Soviet Jews: Protection of the Right of Emigration Under International Law*, 14 HARV. J. INT'L L. 102 (1974).

tional stature. Two resolutions, both supported by the USSR, have been unanimously passed by the General Assembly which have declared it to be binding.⁷¹

3. *The International Covenant on Civil and Political Rights*

The right to freedom of movement was reaffirmed in the International Covenant on Civil and Political Rights. Having been ratified by a sufficient number of states, including the Soviet Union, it recently became binding upon its signatories.⁷² Article 12 provides that everyone is free to leave his own country, subject only to considerations of national security and those factors in Article 29(2) of the Universal Declaration.⁷³ As previously indicated, these restrictive considerations can easily be manipulated to justify almost any limitations.⁷⁴

The Soviets unsuccessfully tried to incorporate these same escape clauses directly into Principle VII of the Final Act.⁷⁵ Nevertheless, it is arguable that these clauses are indirectly inserted into the Act, as the Helsinki accord does make a vague pledge that the CSCE participants will "fulfill their obligations" consistent with the Covenant's mandate. While the Covenant's permissible restrictions may not constitute "obli-

⁷¹ Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/L/. 323 and Add. 1-6 (1960); Declaration on the Elimination of all Forms of Racial Discrimination, G.A. Res. 1904, 18 U.N. GAOR Supp. 15, at 35, U.N. Doc. A/5603, A/L. 435 (1963). For a discussion of the legal effect of the Universal Declaration, see SOHN & BURGEN-THAL, *supra* note 61, at 518-22.

⁷² See Knissbacher, *supra* note 70, at 97-9.

⁷³ Article 12. 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. 4. No one shall be arbitrarily deprived of the right to enter his own country. International Covenants on Human Rights, G.A. Res. 2200 (XXI), GAOR, 21st Sess., Supp. 16, at 49, U.N. Doc. A/6316 (1966).

⁷⁴ See section IV-C of text, *infra*.

⁷⁵ Russel, *supra* note 15, at 268.

gations," the Soviets will most likely choose to regard them as a qualification of the Final Act. Thus the Act's reference to the Covenant's endorsement to free movement could be effectively negated.⁷⁶

4. *The Convention on the Elimination of all Forms of Racial Discrimination*

Although it is not specifically mentioned in the Final Act, the Convention on the Elimination of all Forms of Racial Discrimination should certainly qualify for inclusion in Principle VII's reaffirmation of international humanitarian accords.⁷⁷ Unlike the Universal Declaration, the International Covenant, and the Helsinki Final Act, the Convention was originally conceived as a fully binding treaty. Article 5 provides guarantees of the right to emigrate paralleling those of the previous accords.⁷⁸ However, under the Convention, the right to emigrate is a civil right granted to individuals.⁷⁹ Yet the creation of such a right was not the motivating force behind Soviet ratification of the Convention; rather they based their acceptance upon the compelling need to combat discrimination.⁸⁰ The USSR has grudgingly acknowledged for the first time that the rights of individuals were thus protected under international law.⁸¹ Efforts to enforce this civil right in the Soviet courts have been largely unsuccessful in regards to emigration, as the courts have simply refused to hear the cases.⁸²

⁷⁶ *Id.*

⁷⁷ International Convention on the Elimination of all Forms of Racial Discrimination, 20 U.N. GAOR Supp. 14, at 47-51, U.N. Doc. A/6014 (1965).

⁷⁸ *Id.*, Article 5(d):

(d) other civil rights, in particular — (i) The right to freedom of movement and residence within the border of the State; (ii) The right to leave any country, including one's own, and to return to one's country; (iii) The right to nationality.

⁷⁹ V. CHALIDZE, *TO DEFEND THESE RIGHTS: HUMAN RIGHTS AND THE SOVIET UNION* 46-47 (1974).

⁸⁰ See U.N. GAOR 121 (1966).

⁸¹ *Id.*

⁸² CHALIDZE, *supra* note 79, at 47.

5. *Uniqueness of the Final Act*

G.I. Tunkin, a leading Soviet jurist, has summarized the essential thrust of these multinational agreements as establishing that all states have a duty to:

- (a) respect the fundamental rights and freedoms of all persons within their territories.
- (b) not allow discrimination by reason of sex, race, or religion.
- (c) promote universal respect for human rights and fundamental freedoms and to cooperate with one another in achieving this objective.⁸³

Long before the CSCE, these accords firmly established emigration as one of these human rights and fundamental freedoms. However, despite Soviet recognition of the validity of these agreements, the non-binding Helsinki Final Act has become the basis of the current offensive against the emigration restrictions of the USSR.⁸⁴ Its utilization by critics in both the East and the West is attributable to the fact that it represents a definitive step beyond its predecessors.

While justifying American participation in the CSCE, President Ford claimed that at Helsinki the communist nations were making a public commitment "to a greater measure of freedom and movement for individuals, information, and ideas than has existed in the past."⁸⁵ However the measure of the right to freedom of movement was certainly as wide under the previous, rather open-ended agreements. The unique value of the Final Act is that it fills in this breadth with more specific details regarding the implementation of this right.⁸⁶ The broad provisions of Principle VII are clarified in Basket III, which pro-

⁸³ TUNKIN, *supra* note 58, at 81.

⁸⁴ Lewis, *Hunger for Rights in Soviet Bloc Spurs Open Protest and Criticism*, N.Y. Times, Jan. 31, 1977, at 1, col. 1; N.Y. Times, Feb. 20, 1977, at 13, col. 6; N.Y. Times, May 2, 1977 at 61, col. 1.

⁸⁵ Ford, *Ford Defends His Helsinki Mission: Excerpt From Statement*, 79 U.S. NEWS & WORLD REPORT 18 (Aug. 4, 1975).

⁸⁶ For instance, in addition to reaffirming the right to emigrate, the Final Act, specifically mentions the shipping of the personal goods of the emigrants. *See e.g.* 73 DEPT. STATE BULL. 340 (1975).

vides recommendations regarding government attitudes, procedures, and conditions.

The reaffirmation of the right to leave one's country was also given a unique role at Helsinki. Human rights were given the same prominence in East-West relations as the peaceful settlement of disputes and respect for territorial boundaries. The Soviets may prove more sensitive to the emigration issue now that its humanitarian pledges have been firmly placed into the more pragmatic context of detente.⁸⁷

III. EMIGRATION AS AN "INTERNAL AFFAIR"

The Helsinki agreement's endorsement of freer movement has thus far been of little direct benefit to Soviet Jews, as the same interpretive conflict afflicts the Final Act as plagued the other international humanitarian accords.⁸⁸ This disagreement once again focuses upon what constitutes interference in the domestic affairs of another country.

The Soviets generally choose to use the internal affairs argument as a blanket defense to any foreign criticism of its policies and actions.⁸⁹ The general rule that a state's emigration policies and regulations are primarily a domestic matter is not questioned. However, the West maintains that by linking questions of human rights to those of national sovereignty through an international agreement, the protection of these humanitarian rights becomes an international concern. As such, the fate of these rights within the USSR cannot be insulated from foreign exposure by categorizing them as internal affairs. Humanitarian issues are thus considered to be as appropriate a concept in international relations as are military and territorial matters. The USSR recognizes the existence of a close link between a state's guarantee of "basic rights and freedoms and the main-

⁸⁷ REPORT OF THE STUDY MISSION, *supra* note 9, at 32.

⁸⁸ Compare an example of Soviet interpretation of U.N. Charter *see* SOHN & BURGENTHAL, *supra* note 61, at 844.

⁸⁹ *See e.g.* Ryzhov, *supra* note 5; REPORT OF THE STUDY MISSION, *supra* note 9, at 6, Zhukov, *Self-Appointed Inspectors*, XXVIII CURRENT DIGEST OF THE SOVIET PRESS 43, Oct. 28, 1976, at 30.

tenance of international peace and security.”⁹⁰ The Soviet Union also acknowledges that the regulation of human rights is now an acceptable intrusion by international law into what was once a totally domestic sphere.⁹¹ Yet, it still contends that human rights remain domestic affairs which are incapable of direct international regulation;⁹² International law is seen as an auxiliary means of protection.⁹³

Neither the Western and Eastern perspectives on the role of human rights in international law is determinative of the internal affairs issue. The conflicting interpretations of the Act by the East and West reflect their general policy interests, as well as their ideologized positions. During the final ceremonies of the CSCE, Breshnev stated that the basic point of the Final Act was that no state should interfere with the workings of the internal laws and policies of another state.⁹⁴ He later went on to make a sharp distinction between the implementation of immediately binding principles such as the inviolability of frontiers and non-intervention in internal affairs, and the human rights provisions whose implementation is contingent upon further consultations with individual countries.⁹⁵ The priority he accorded to the non-intervention principle reflects Soviet fears that the Final Act could be utilized as an interventionist wedge into its human rights affairs. This non-intervention stance is primarily based upon Guiding Principles I and VI. The Sovereign Equality Principle (I) requires that the signatories respect each other's “rights to determine its own laws and regulations.”⁹⁶ Principle VI prohibits any direct or indirect inter-

⁹⁰ TUNKIN, *supra* note 58, at 81.

⁹¹ *Id.*, at 82.

⁹² For a more detailed discussion of the role of human rights in communist international legal theory, see section IV-C of text.

⁹³ TUNKIN, *supra* note 58, at 82-3.

⁹⁴ Russel, *supra* note 15, at 256 & n. 39.

⁹⁵ *Hearings on H. Res. 864*, *supra* note 2, at 37.

⁹⁶ I. *Sovereign equality, respect for the rights inherent in sovereignty*

The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to judicial equality, to territorial

vention in the domestic affairs of another state through an attempt to subordinate the other's sovereign rights to one's own advantage.⁹⁷

The West has chosen to interpret these provisions in a manner that repudiates the "Breshnev Doctrine" which seeks to justify forceful Soviet intervention into the affairs of Eastern Europe. This doctrine asserts a distinction between the interstate relations of the communist and non-communist nations under international law. It claims that the common interests and aspirations of the socialist working peoples transcend borders and are indivisible. While a communist country is free to promote socialism in its own manner, any threat to socialism itself requires that all true socialists take action to insure that the "legitimate" national interests are protected.⁹⁸ As events in Poland, Hungary, and Czechoslovakia have indicated, these "legitimate" interests generally coincide with those of the USSR.

Under the terms of the Final Act, the Breshnev doctrine would not be an acceptable form of intervention. Principle VI clearly forbids intervention "in all circumstances . . . regardless of their mutual relations." However the doctrine is circuitously reprieved by Guiding Principle X. This section requires that the participants must also honor their obligations arising from other international treaties and agreements. The Soviet Union has already embodied the doctrine in "mutual

integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.

Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement. They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality.

⁹⁷ See *supra*, note 28.

⁹⁸ See B. RAMUNDO, *supra* note 55, at 33-36, 103-107; Russel, *supra* note 15, at 253-57.

assistance" treaties with Warsaw Pact nations.⁹⁹ These agreements are irreconcilable with the Final Act. Nonetheless, treaties have a higher status under international law than would the Helsinki agreement. This legal supremacy can thus be utilized to insulate the Breshnev Doctrine from critics citing the Final Act.

The selective assertion that the non-intervention principle is applicable to Western concern over the Jewish emigration issue, but not to Moscow's efforts to help keep Eastern Europe in line still poses a serious interpretive dilemma for the Kremlin. The wording and structure of the Act's intervention references indicate that they are directed more at military, rather than humanitarian intervention. First of all, the Western interpretation is served by Section 1(b)(1) which declares that the Guiding Principles (which include Principles VI and VII) offers protection "in particular from invasion or attack on its territory. Participating states are:

- To refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights.
- To refrain from any act of economic coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

Also, the only examples of forbidden intervention cited are of an inherently violent nature. Such coercion is unlikely to be used by the West in its support of the promotion of freedom of emigration in the Soviet Union.¹⁰⁰ Except for possible indirect propaganda benefits, Western pressures in support of freer

⁹⁹ Russel, *supra* note 15.

¹⁰⁰ However enforcement of the economic coercion clause might be interpreted as militating against attempts such as the Jackson-Vanik amendment to directly tie trade benefits for the USSR to an easing of its emigration restrictions. The history of that amendment demonstrates that such direct economic attempts to effect internal change in the USSR are likely to be counter-productive and diplomatically embarrassing to the United States. See HUMAN RIGHTS (Samizdat), No. 1-6 (1975); B. EISSENSTAT, THE SOVIET UNION, THE SEVENTIES AND BEYOND 105 (1975).

movement for Soviet Jews simply cannot be deemed a subordination of Soviet sovereignty to its own interests.

Secondly, the non-intervention principle was not included in Basket III which deals most directly with human rights, particularly emigration. Soviet demands that modifying "laws, regulations, and customs" language be inserted in Basket III were rejected by the CSCE.¹⁰¹ A compromise provided that the preamble of Basket III would indicate "respect for the Principles Guiding Relations between Participating States."¹⁰² This seemingly indicates that the CSCE did not consider the Basket III provisions to be internal affairs which were beyond the scope of international influence.

Having thus recognized the role of human rights in international relations, participated in extensive discussion over Soviet policies and procedures during the CSCE, and included Basket III's lengthy and relatively specific provisions on this matter, it is inconsistent for Moscow to assert that the non-intervention principle quarantines its human rights policies from outside analysis. It is doubtful if either the USSR or the United States is going to let inconsistency resulting from a still non-binding agreement stand in the way of their policy objectives. The Kremlin is less concerned with the legal construction of Principle VI than it is with the balancing of the advantages of detente with the perpetuation of its control, both internally and throughout Eastern Europe. President Ford and Secretary of State Kissinger recognized the potential double interpretation of the non-intervention clause. However both refused to accept its application to Basket III.¹⁰³ Washington might be more inclined to alter this stance if it appears that other goals, such as the SALT negotiations, are fatally threatened by its promotion of human rights in the East. Since both East and West are unlikely to recognize a Breshnev Doctrine/human rights inter-

¹⁰¹ REPORT OF THE STUDY MISSION, *supra* note 9, at 29.

¹⁰² Russel, *supra* note 15, at 267-68.

¹⁰³ Ford, 73 DEPT. STATE BULL. 311 (1975); Kissinger, 73 DEPT. STATE BULL. 320. (1975).

vention quid pro quo, they shall probably continue to invoke the non-intervention doctrine to suit their own needs.¹⁰⁴

IV. THE RELATION OF THE FINAL ACT TO SOVIET EMIGRATION STANDARDS

A. *Relation to Communist International Legal Theory*

The Soviet position upon the implementation of the emigration related provisions of Basket III must be understood within the context of the communist theory of human rights. While the theory recognizes that international legal norms can provide an auxiliary vehicle for securing human rights, this recognition is qualified by the affirmation that these rights remain the domestic affairs of the state. Although multinational agreements can obligate states to grant such rights to their citizens, they cannot grant them directly to individuals. Communist ideology asserts that human rights do not exist outside of the state.¹⁰⁵ They are seen as strictly a social and class concept, having no independent, individual existence.¹⁰⁶ Yet this theory was contradicted in Guiding Principle VII which asserted that all human rights and fundamental freedoms "derive from the inherent dignity of the human person." This assertion emphasized the Western belief that these rights are not merely privileges which governments have the option of extending to their citizens.¹⁰⁷

This theoretical disagreement between the East and West is further reflected in the emphasis which the Soviets put upon the Helsinki agreement's call for the freer movement of people. They stress the promotion of tourism and official exchanges of representatives of various professional, cultural, and educational groups. This is in keeping with their emphasis upon the collective nature of human rights. It also suggests that the Soviets are not prepared to see the freer movement provisions utilized to encourage emigration. The West recognizes the value

¹⁰⁴ See Browne, *Breshnev to Visit Yugoslavia Today*, N.Y. Times, Nov. 15, 1976; REPORT OF THE STUDY MISSION, *supra* note 9, at 28-9.

¹⁰⁵ TUNKIN, *supra* note 58, at 82-3.

¹⁰⁶ See Kudryavtsev, *supra* note 56, at 193-99.

¹⁰⁷ See Russel, *supra* note 15, at 269.

of such exchanges, but it places the freedom of movement sections into a broader humanitarian context which includes individuals. This context also stresses the right to permanently abandon one's country, as opposed to merely being allowed a temporary sojourn.

B. *Compatibility with Soviet Law*

This theoretical distinction need not be determinative, as the USSR claims that its laws do not conflict with the Final Act and the other international accords which deal with this point. Since under these accords the right to leave one's country is guaranteed, Jewish citizens should already possess this right, regardless of whether its origin is social or individual. Accordingly, the realization of Basket III goals need not be seen as an inherent threat to Soviet sovereignty or its legal system. Although the right to leave the USSR is not directly guaranteed in its laws, very few countries do accord such express legal recognition to the right.¹⁰⁸ There are, at least, no substantive laws restricting the right of Soviet citizens to emigrate. Thus, Soviet law is not intrinsically adverse to the concept of liberal emigration.

While a literal reading of the laws of the USSR constitutes an admirable creed of civil rights, Article 5 of the Fundamental Principles of Civil Legislation withdraws protection of these rights if they are "exercised in contradiction to the purpose of these rights in a socialist society during the period of the building of communism."¹⁰⁹ Attempts to leave the USSR which

¹⁰⁸ Ingles, *supra* note 7, at 26, para. 69.

¹⁰⁹ CHALIDZE, *supra* note 79 at 46. A glaring example of how little is required for such a contradictory exercise is evidenced by the Soviet definition of treason. Treason includes any act which is:

"to the detriment of state independence, the territorial inviolability, or military might of the USSR, . . . flight abroad or refusal to return abroad from the USSR. . . and rendering aid to a foreign state in carrying on hostile activity against the USSR," Article 64, Criminal Code of the R.S.F.S.R.

No distinction is made between criminal and ideological offenses, Art. 70 of the Criminal Code calls for the deprivation of freedom for a term of six months to seven years to anyone attempting to "subvert or weaken the Soviet regime"

are not in accordance with government regulations constitute such a contradictory exercise. Violators are subject to criminal prosecution and three years of imprisonment.¹¹⁰ Such rigidity with respect to the enforcement of emigration restrictions is not simply a recent phenomena on the USSR. Throughout Russia's xenophobic history, the expression of a desire to leave the motherland has traditionally placed the potential emigre into a highly suspicious category. The toll of the perpetuation of this attitude can be one's job, education, and parental rights.¹¹¹ As Marxism recognizes human rights as originating only in a social context, with the individual being assimilated into the political power, the person who is no longer a part of the collective entity is in a frightening situation.¹¹² The requirement that a petitioner first permanently renounce his Soviet citizenship thus places him into just such a purgatory.¹¹³

In keeping with this denigration of an individual legal personality, Soviet authorities justify emigration restrictions on the grounds that they protect the "general welfare" and "economic and social well being" of the remainder of the citizenry.¹¹⁴ The right to emigrate is seen as a privilege which should only be granted if the rights of others would not be negatively affected.¹¹⁵ Since the applicants have received benefits from their families and the system as a whole, they should therefore not be allowed to renege upon their reciprocal obligations. Since almost any action has some relation to the "general welfare

through "slandorous falsifications which defame the Soviet state and social system," Jewish protests of Soviet emigration policies are considered to be such slanderous falsifications. See Berman, *The Right of Convicted Citizens to Emigrate: A Comment on the Essay by V.N. Chalidze*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 18-19 (1973).

¹¹⁰ See R.S.F.S.R. 1970 Criminal Code, Art. 83, in H. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* (2nd ed. trans. H. Berman and J. Spindler 1972) at 156.

¹¹¹ SCHROETER, *supra* note 10, at 370-71; Chalidze, *supra* note 79, at 46.

¹¹² See RAMUNDO, *supra* note 55, at 85-6.

¹¹³ FELDBRUGGE, *Taxation, Natural Persons*, II ENCYCLOPEDIA OF SOVIET LAW (app. ix) 741 (F. Feldbrugge ed. 1973).

¹¹⁴ See Knissbacher, *supra* note 70, at 104-05.

¹¹⁵ Kudryavtsev, *supra* note 56, at 198.

and well being," this rationale can easily be invoked as a strait jacket for those who wish to emigrate.

Substantive law generally becomes relevant to the aspiring emigrant only when he has already run afoul of the administrative regulations. Of the major criminal laws so invoked, their equitable enforcement would place few barriers in the path of those wishing to leave.¹¹⁶ Enforcement modifications and the application of the human rights contained in the Soviet constitutions would be sufficient to bring the substantive law of the USSR into line with Basket III.¹¹⁷

C. *Incompatibility with Soviet Administrative Practice and Procedures*

The administrative regulations relating to emigration are not so easily reconciled to Basket III. Since Soviet authorities view emigration as essentially an administrative, rather than judicial matter, these regulations are especially significant.¹¹⁸

Emigration is under the supervision of the Ministry of Internal Affairs. Applications are handled by the Ministry's visa and Foreign Registration Section (OVIR).¹¹⁹ Because of the lengthy, intricate, and even chaotic nature of its administrative process, an exhaustive legal analysis would be well beyond the scope of this study. An analysis of its practices and procedures is complicated by its policy fluctuations and tendency not to reveal the rationale behind them. Prior to the CSCE, the regulations governing its criteria for approvals or denial were not even known. The external requirements which were published were often inconsistent.¹²⁰ Since the signing of the Final Act,

¹¹⁶ See examples *supra*, note 109.

¹¹⁷ See Sulzberger, *Where Do We Go Now?*, N.Y. Times, Feb. 20, 1977, at 15, col. 2.

¹¹⁸ This practice is in keeping with the general tendency of socialist legislation to give a great deal of autonomy to administrative agencies. Toman, *The Right to Leave and to Return in Eastern Europe*, 5 ISRAEL Y.B. ON HUMAN RIGHTS 314 (1975).

¹¹⁹ CHALIDZE, *supra* note 79, at 98-9.

¹²⁰ Knissbacher, *supra* note 9, at 57.

OVIR has, for the first time, officially stated its emigration rules.¹²¹

It is difficult to utilize the Final Act to promote such general policy improvements, as the Helsinki accord does not directly guarantee the right of emigration to all citizens. The USSR successfully resisted Western attempts to insert such direct language into the Final Act. As a compromise the Human Contacts section of Basket III rather vaguely supports the general right by its call for the facilitation of:

. . . freer movement and contacts, individually and collectively, privately or officially among persons. . . and to contribute to the solution of the humanitarian problems that arise in that connexion.

It also reaffirms previous accords embodying the right. Of more immediate value to Soviet Jewry is subdivision (b) on the reunification of families.¹²² To even be eligible to apply for an exit visa, the petitioner must produce an invitation from a close relative living in the country of destination. These provisions are thus directly applicable to the more than 130,000 eligible Soviet Jews who are still waiting for a determination on their exit applications, as well as to many of the "refusniks".¹²³ The section does not place limits upon the degree of family relationship which is required. This factor is often used by OVIR to justify denials.¹²⁴ Even an immediate family relationship is sometimes deemed insufficient if the applicant has not seen the relative for a long period of time.¹²⁵ In light of the rigid exit procedures, which shall be subsequently developed, this often is not the fault of the petitioner. However, the frequency of family contacts has been disregarded in the use of the actions of relatives as justifications for the rejection of exit applications.¹²⁶ Hopefully, the realization of the Final Act's general mandate to deal

¹²¹ REPORT OF THE STUDY MISSION, *supra* note 9, at 57.

¹²² *Id.* at 55.

¹²³ CHALIDZE, *supra* note 79 at 99.

¹²⁴ *Id.*, at 99-100.

¹²⁵ *Id.*

¹²⁶ *Id.*

with emigration requests in a "positive and humanitarian spirit" could soften such rigidity.

OVIR's minimal procedural requirements alone are sufficiently time consuming to be deemed a contradiction of the Final Act's exhortation to deal with these applications as "expeditiously as possible." After receipt of the initial invitation from a relative, OVIR swamps the applicant with a deluge of often trivial paperwork.¹²⁷ Since the CSCE, some progress has been made in this area. An applicant no longer is required to obtain references from the director of his place of employment, the secretary of his trade union, and the local secretary of the Communist party.¹²⁸ The latter had been required even if he was not a party member.¹²⁹ However he must still present a medical certificate, verification of his place of employment, and affidavits evidencing the consent of his spouse and parents (regardless of the applicant's age) to his emigration.¹³⁰ Because of the pervasive power of the Soviet state, all of the above parties can easily be subjected to hostile pressures.¹³¹ Furthermore, one must always deal with OVIR personally, as he cannot act through the mail or by the representation of counsel.¹³² This can require the applicant to take frequent leaves of absence from his job. Another improvement since the CSCE is that OVIR now allows its local branches to handle initial applications, rather than requiring the petitioner to go to the central authorities.¹³³

The reunification of families subsection states that the signatories "will lower when necessary the fees charged in connection with these applications to ensure that they are at a moderate level." The inclusion of this provision clearly reflects one of the most frequent criticisms of the Soviet emigration process. The petitioner must first pay a 500 rouble fee

¹²⁷ *Id.*

¹²⁸ REPORT OF THE STUDY MISSION, *supra* note 9, at 57.

¹²⁹ CHALIDZE, *supra* note 79, at 99.

¹³⁰ *Id.*, at 100.

¹³¹ *Hearings on H. Res. 864*, *supra* note 2, at 96.

¹³² CHALIDZE, *supra* note 79, at 100.

¹³³ REPORT OF THE STUDY MISSION, *supra* note 9, at 57.

for the renunciation of Soviet citizenship, in addition to general exit and visa fees of 300 roubles. Prior to Helsinki, the latter fee was 400 roubles.¹³⁴ In the past the applicant had also been subject to the controversial education tax which was to reimburse the state for the "free" education and training it has bestowed. Estimates of these mandatory reimbursements ranged from \$5,000 to \$37,400.¹³⁵ Because of the hostile Western reaction to the imposition of the tax, the Soviet government has announced its discontinuation. However it was a most effective impediment, as up to 40% of those trying to leave the USSR have received higher educations.¹³⁶ Furthermore, educational distinctions are made by the administrative favoritism shown to those who have studied in non-scientific or non-technical fields.¹³⁷

The alleviation of these taxes has been somewhat negated by the imposition of higher taxation upon the use of foreign currencies. Since the signing of the Final Act, new regulations prohibit foreign monetary gifts to Soviet residents.¹³⁸ The 30% tax upon the transfer of any foreign currency already in the USSR has also been increased.¹³⁹ These actions have a devastating effect upon those who wish to emigrate. Outside funds are often essential to pay the exit fees. Since the mere emigration application often means the immediate loss of one's job, such assistance may be especially necessary. Western Jewry's efforts in this regard will thus be hampered. This inhibition is in contradiction to the stipulation in subsection (b) that:

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.

¹³⁴ Pettiti, *supra* note 49. The current value of a rouble is \$1.35. 400 roubles would represent an average of four months wages. CHALIDZE, *supra* note 79, at 106.

¹³⁵ N.Y. Times, Sept. 22, 1972, at 3.

¹³⁶ SCHROETER, *supra* note 10, at 355.

¹³⁷ *Id.*, at 364-65.

¹³⁸ Hearings on H. Res. 864, *supra* note 2, at 80.

¹³⁹ HUMAN RIGHTS (Samizdat), No. 1-6 (1975), at 15.

These modalities provide for the facilitation of temporary and regular visits to relatives living in another country. It provides the same guidelines and protections that are found in the following subsection on the reunification of families. Jewish leaders realize the improbability that the USSR would permit such temporary meetings outside its borders. Their immediate hope is that the Soviet authorities will cease their interception of non-physical communications between Soviet Jews and their Western counterparts. Aside from the new financial restrictions, reports of other forms of communication obstruction have been frequent.

One of the most frequent grounds for rejection is that the applicant's detention is necessary on military or national security grounds. In the absence of special permission, Soviet regulations provide that one who has been privy to secret, classified materials may not leave the country for two to five years from the time of exposure. However, denials have still been issued after the expiration of this period.¹⁴⁰ Since the Soviets are notoriously secretive about such matters, a large number of potential emigres are affected. Utilization of security restrictions to impede emigration is facilitated by the standard requirement that those working on classified projects sign a conventional form stating that they are doing so. However one is not warned that signing this document could bar him from leaving the country.¹⁴¹ Since he is likely to be fired or demoted for having applied to leave, this mandatory waiting period can be quite hazardous. He is unable to contest the security classification, as no criteria are available to him for the evaluation of such a claim.¹⁴² If the applicant has not been privy to such information, the authorities have not hesitated to call up the petitioner for military induction or retraining. This automatically exposes him to classified information. This pretext can be repeatedly invoked upon the petitioner in order to extend the waiting period. Western concern over such pressures led the

¹⁴⁰ Knissbacher, *supra* note 70, at 104.

¹⁴¹ REPORT OF THE STUDY MISSION, *supra* note 9, at 58.

¹⁴² Knissbacher, *supra* note 70, at 104.

CSCE to insert into Basket III the protection that "the presentation of an application concerning family reunification will not modify the rights and obligations of the applicant or members of his family."¹⁴³

The position of the rejected applicant is especially precarious, despite the provisions of section 1(b) of Basket III which provides that:

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 . . . under such circumstances fees will be charged only when applications are granted.

Because of the OVIR policy of issuing oral refusals which do not state the cause of the denial, the rejectee does not know if he is permanently or temporarily ineligible.¹⁴⁴ In view of the difficulty of ascertaining the grounds for the denial and the even greater hardship and uncertainty involved in repeating the entire process, the petitioner may well hesitate to renew his application. On the other hand, his position may have already deteriorated to the desperate point where he has little left to lose. There has been some improvement in OVIR's reapplication policies. Applications rejected since Helsinki are now eligible for reconsideration every six months, rather than annually.¹⁴⁵ Also, the passport fee is not levied on reapplications. However very few reconsidered applications have been approved.¹⁴⁶

Soviet Jews who find their right to leave the country obstructed by the government are thus faced with a dilemma. So far, appeals to the West have proven to be the only effective means of budging the authorities. Yet, such appeals can make the protesters vulnerable to criminal prosecution under a loose

¹⁴³ 73 DEPT. STATE BULL. 340 (1975).

¹⁴⁴ CHALIDZE, *supra* note 79, at 103.

¹⁴⁵ REPORT OF THE STUDY MISSION, *supra* note 9, at 58; See SCHROETER, *The Jewish Freedom Movement in the Soviet Union: Confrontation Tactics in a Totalitarian Society*, 1 CIVIL LIBERTIES REVIEW 100 (1974).

¹⁴⁶ *Id.*

reading of the Criminal Code.¹⁴⁷ It is submitted that conviction would certainly constitute a modification of the "rights and obligations of the applicant and of members of his family."¹⁴⁸

While the protest tactics have occasionally succeeded, attempts to challenge administrative rulings in the Soviet courts on the grounds of international law have generally failed. One example is the *Kolyaditskaya* case, in which a Soviet lawyer attempted to invoke the Convention on the Nationality of Married Women in order to join her husband in Israel. The provisions of this accord include those later embodied in section 1(c) of Basket III, concerning marriage between citizens of different states. The Convention was legally binding and allowed an individual recourse to the International Court of Justice. The Soviet court ruled against Mrs. Kolyaditskaya's petition. However the publicity surrounding the case prompted the authorities to grant permission to emigrate before her case could be brought to the International Court.¹⁴⁹

Despite the post-Helsinki clarification and modification of the regulations, OVIR's administrative procedures and practices still do little to facilitate "freer movement" and solve the "related humanitarian problems." These reforms have had little measurable effect due to the perpetuation of the Kremlin's underlying hostility to Jewish emigration. More than cosmetic alterations of the regulations will be needed to alleviate the hardship they impose upon the applicants. Far narrower interpretations of what constitutes such terms as "national security" and "general welfare" are called for.

V. FROM HELSINKI TO BELGRADE: POST CSCE DEVELOPMENTS

Since the signing of the Final Act, the Soviet government has tightened internal controls to insulate the Russian people

¹⁴⁷ See note 109 *supra*.

¹⁴⁸ Aside from having their emigration requests denied on account of the actions of other family members, relatives can also easily be convicted as accomplices. See Art. 88-1, Criminal Code of the R.S.F.S.R.

¹⁴⁹ CHALIDZE, *supra* note 79, at 47-48.

¹⁵⁰ See Shulman, *supra* note 8, at 332-34.

from increased Western contacts.¹⁵⁰ The resulting repression is demonstrated by the drop in Jewish emigration since the CSCE. While an average of 13,000 Jews left the USSR monthly in 1975, only 1,000 per month did so in 1976.¹⁵¹ Unfortunately, the non-binding Final Act does not provide for sanctions or judicial recourse as a response to such actions. It simply calls for future evaluative meetings. The first of these meetings is to take place in Belgrade in June, 1977. As could be expected, the Soviets wish to have Basket I and II issues dominate this session, while the West wishes to stress the implementation of Basket III.¹⁵²

In order to bolster the legal force of the Act, it has been proposed that the Helsinki accord be ratified and declared binding at Belgrade. Even if this were to be done, enforcement would still be difficult to achieve. The Berlin Conference of the Warsaw Pact recently proposed that all U.N. drafted human rights pacts be ratified and strictly observed. However their motivation was to aid "the struggle of the capitalist countries' working people for real social and political rights."¹⁵³

Of greater long run significance is the effect which the Final Act has had upon the Russian people. It has sparked an upsurge in emigration applications throughout the USSR and Eastern Europe. The petitioners are supporting their requests with direct references to the pledges of the Final Act.¹⁵⁴ Kremlin compliance with its provisions is being directly monitored to the West by a group of Russian dissidents.¹⁵⁵ These developments

¹⁵¹ Soviet authorities attribute the drop to a decrease in the number of applications submitted. This explanation is contested by other sources, who claim that there has been a marked increase in the number of applications filed by both Jews and Gentiles. Certain non-Jewish nationalities have received an increased number of visas. See SPECIAL REPORT OF THE STUDY MISSION, *supra* note 9, at 2-3, 6, 56-7.

¹⁵² *Id.*, at 7.

¹⁵³ Zagladin, *Europe: Route of Peace and Social Progress*, Pravda, July 28, 1976, at 4-5; reprinted in XXVIII THE CURRENT DIGEST OF THE SOVIET PRESS 30 (Aug. 25, 1976) at 11-12.

¹⁵⁴ SPECIAL REPORT OF THE STUDY MISSION, *supra* note 9, at 2-3.

¹⁵⁵ Despite the arrest of many of its members, the committee is still functioning and encouraging the West to pressure Soviet authorities into compliance. See Wren, *Soviet Dissenters Vow to Fight On*, N.Y. Times, Mar. 2, 1977, at 6.

may bring about some liberalization of Kremlin emigration policies, as the USSR is cognizant of the effect which such actions may have upon world public opinion.

In seeking to promote a positive image, the USSR is still unlikely to capitulate to what it considers economic blackmail.¹⁵⁶ In view of its economic self sufficiency, it is highly improbable that it would feel compelled to reverse itself and suddenly allow unlimited emigration to her Jews. Such a humiliating action could be interpreted as recognition of the failure of her nationality policy. Secondly it would set a precedent which might encourage other nationalities in the USSR to demand a similar right to leave "en masse". Thirdly, Israel would be unable to immediately absorb the gigantic influx which would suddenly arrive. Finally, the USSR is unlikely to risk the alienation of the Arab nations by such an infusion of Zionist recruits.

Since completely free emigration from the USSR is an unrealistic goal, the West should strive for the more readily obtainable goals of implementing the more limited and precise provisions of Basket III. This would require changes in OVIR's administrative policies. However, a less repressive interpretation of existing Soviet law would generally be acceptable.

While world opinion should continue to press for immediate emigration in extreme hardship cases, a reasonably small, but steady, flow of emigres might be satisfactory. The Cuban airlift to the United States, despite its deficiencies, might provide a model for such a program. However, acceptance by the West and Soviet Jewry would be contingent upon an end to the discrimination shown to the remaining applicants. It would also be understood that they would not have to wait indefinitely. Until some sort of machinery is formed to implement Basket III, the West should continue to use alternative channels, such as the United Nations. The modest efforts of the Secretary General of the U.N. have already proven to be quite successful in this regard.¹⁵⁷

¹⁵⁶ See Trudeau, *Doonesbury*, *The Boston Globe*, Mar. 3, 1977, at 21, col. 2.

¹⁵⁷ 65 DEPT. STATE BULL. 663-64 (1971).

Under the Carter administration, the United States has become increasingly insistent that the USSR honor its human rights commitments.¹⁵⁸ The President has based this stance squarely upon the Helsinki accords, rather than the previous human rights accords.¹⁵⁹ The administration has also moved to correct our own violations of the Final Act, particularly through the modification of immigration laws.¹⁶⁰ These moves should serve to improve the United States position at Belgrade. The Kremlin should be made to understand that the American public will have less faith in further bilateral agreements if it appears that the USSR has already disregarded the Final Act. However, Western human rights pressures could also force Breshnev into such a defensive position that he will be particularly obstinate to avoid any appearance of capitulation. This situation requires that Western policy makers strike a balance between the utilization of opportunities to promote the emigration of Soviet Jews and the exercise of restraint by not pursuing unrealistic goals which could permanently jeopardize crucial areas of East-West relations. Hopefully, the realization of the security which the USSR sought in the CSCE will make the Soviets more receptive to the promotion of humanitarian, as well as economic and military cooperation.

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¹⁵⁸ Sulzberger, *supra* note 92.

¹⁵⁹ N.Y. Times, Feb. 20, 1977, at 13, col. 6.

¹⁶⁰ TIME, Mar. 7, 1977, at 11, col. 2; The Boston Globe, Mar. 10, 1977, at 30, col. 2.