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## The Humanitarian Provisions of the Helsinki Accord: A Critique of their Significance

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# THE HUMANITARIAN PROVISIONS OF THE HELSINKI ACCORD: A CRITIQUE OF THEIR SIGNIFICANCE\*

*Valery Chalidze\*\**

## TABLE OF CONTENTS

I.	THE HELSINKI MOVEMENT .....	430
II.	CRITICISM OF THE HUMANITARIAN PROVISIONS OF THE HELSINKI ACCORD .....	434
	A. <i>A False Symmetry</i> .....	436
	B. <i>Specific Provisions of the Accord</i> .....	440
	1. The Declaration of Principles .....	440
	2. Contacts and Regular Meetings on the Basis of Family Ties .....	441
	3. Reunification of Families .....	442
	4. Marriages Between Citizens of Various States .....	444
	5. Travel for Personal or Professional Reasons	445
	6. Religious Activities and Contacts .....	445
	7. Tourism, Youth Conferences, and Sports ....	446
	8. Information .....	447
	9. Cooperation in the Fields of Culture and Science .....	449
III.	CONCLUSIONS .....	449

It is no exaggeration to say that the humanitarian provisions of the Helsinki Accord have been recorded in the history of international relations by virtue of not so much their content as the strong public response they have elicited.<sup>1</sup> This reaction is per-

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\* Copies of the original Russian text of this article are available through the *Vanderbilt Journal of Transnational Law*.

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1. The Helsinki Accord created more world public interest than much more

haps surprising, for the humanitarian provisions of the Helsinki Accord itself are very weak. If the convergence of East and West means loss by the West of its legal perspective on issues as fundamental as human rights, then I would not recommend such a convergence. Keeping in mind the development of such problems in the future, it would be wise to criticize the content of the Helsinki Accord. Following some brief remarks on the Soviet Helsinki movement, I will criticize the Helsinki Accord in the hope that this criticism will help those who sign future agreements with the Soviet Union to be more attentive.

## I. THE HELSINKI MOVEMENT

The social movement in the USSR, stimulated by the Helsinki Accord, is truly without precedent. It was initiated by the Orlov Group<sup>2</sup> which took seriously the loose, semi-obligations of the nations participating in the Conference on Security and Cooperation in Europe (CSCE). Ukrainian, Lithuanian, Armenian, and Georgian groups later appeared, as well as groups in Europe and the United States.<sup>3</sup> The press and public figures in the Western world devoted much attention to the development of the Helsinki

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complete documents of international law guaranteeing human rights, *e.g.*, the United Nations Human Rights Covenants and Conventions. One reason for this phenomenon is that with the Helsinki Accord, the Soviet Union for the first time accepted obligations in the realm of human rights in the company of rather civilized partners. The Human Rights Covenants and international conventions were approved by the United Nations, but their participants include many states in which the problem of human rights is rather acute. As a result, the average standards for human rights among the states supporting these documents are not high; with regard to some rights, they are lower than corresponding standards in the Soviet Union. Contrasted to the states participating in the Conference on Security and Cooperation in Europe (CSCE), however, the Soviet Union's observance of human rights is completely intolerable and contrary to the standards of countries that consider themselves civilized.

2. The Orlov group was formed by members of the public to assist the Soviet Government in carrying out the Helsinki Agreement. Participants included: Yuri Orlov, Aleksandr Ginzburg, Anatoly Marchenko, Elena Bonner-Sakharov, Viktor Nekipelov, and other well known human rights activists. Six volumes of the Group's documents have been published by the Khronika Press. See English translations and surveys in the *CHRONICLE OF HUMAN RIGHTS IN THE USSR*. Publications and individual documents may be obtained from Khronika Press, 500 Eighth Avenue, New York, New York 10012.

3. In the United States, Helsinki Watch (205 East 42nd Street, New York, New York 10017), Robert Bernstein, Chairman.

movement and expected something concrete to emerge from the Helsinki Accord. It became clear, especially after Belgrade, that these expectations were futile, that the USSR did not intend to live up to its promises, yet still the idea of Helsinki instilled in the consciousness of Western societies the hope that one day the Soviet Union would become a respected member of the commonwealth of civilized countries.

Since the signing of the Final Act in 1975, activists in the Soviet Helsinki movement have done much in the way of analyzing Soviet violations of rights and informing Western society of these violations. What have they achieved? They have not improved the situation in the USSR. They have not made the USSR live up to its international obligations. Activists in the Helsinki movement have, however, helped the West recognize the human rights problems in the Soviet Union and understand that in concluding international agreements, such as the Helsinki Accord, the Soviet Union is simply deceiving its Western partners. A simple matter, it would seem, but so many sacrifices were needed for the West to understand! Is it understood once and for all?

It is sufficient to examine the volumes of documents of the Soviet Helsinki Group to see the exceptionally broad scope of the movement's activity. They contain detailed discussions of violations of individual rights in the USSR, such as the rights to emigration and exchange of information, and the collective rights of social, national, and religious groups such as the Pentecostals, Jewish emigrants, political prisoners, and workers. In addition, various Helsinki groups have published surveys characterizing the human rights problem in the USSR as a whole and, on occasion, stating the philosophy of the Soviet Helsinki movement. Unfortunately, less than a year after the founding of the first Helsinki Group in Moscow, a new topic appeared in the documents of all the Helsinki groups—reports on the arrests of Helsinki group members themselves.

As indicated above, the first Helsinki Group was organized on May 12, 1976 by Yuri Orlov and ten other well-known members of the human rights movement. The Moscow Group's founding declaration announced that it would assist in observing the humanitarian provisions of the Helsinki Final Act. The Group also stated that it intended to inform the government and the public about direct violations of the Helsinki Accord's humanitarian provisions by the Soviet Union and that it was prepared to receive written complaints of violations from Soviet citizens. With

the help of the public, the Group planned to gather any information concerning violations of the provisions mentioned.

It could be seen from the Group's very first documents that this important task was being undertaken by people who were indeed capable of making an authoritative evaluation of the incoming information and analyzing it according to the principles of the international human rights movement. They adhered scrupulously to proven facts, avoiding any emotional evaluation, exaggeration, or propagandistic device. The Group's documents are serious, dry, and therefore more tragic testimonies of what is going on behind the backs of the Soviet propagandists as they attempt to convince the world that the Soviet Union is strictly observing the Helsinki agreements.

The reader who is not familiar with the activity of the Soviet human rights movement may wonder how the Soviet Helsinki groups, whose members include practically no lawyers,<sup>4</sup> were able to evaluate judicial proceedings authoritatively and to compile serious surveys of the state's judicial practices. It is important to point out that the Helsinki groups were organized primarily by people already active in the Soviet human rights movement and committed to its traditions. During the ten years of the movement's existence, a concerted effort has been made to provide objective and impartial evaluation of information concerning judicial proceedings. During this time, the movement as a whole acquired knowledge of Soviet law and of the international standards of human rights. It is precisely this evolution that explains the high quality of the Helsinki group's documents and the fact that they immediately gained public confidence.

Although the activity of the Helsinki groups is generally a continuation of the traditions of the Soviet human rights movement, it is interesting to note one distinctive feature. During its initial years, the movement addressed its documents primarily to Soviet

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4. In late 1976, the Moscow Helsinki Group formed the Working Commission on the Use of Psychiatry for Political Purposes in the USSR. Lawyer Sofya V. Kalistratova served as a consultant to this Commission. To my knowledge she is the only lawyer among the activists in the Moscow Helsinki Group. Lawyer Kalistratova is known as a bold defender who has acted on principle at many political trials. The authorities have subsequently ceased allowing her to participate in political trials.

The Ukrainian Helsinki Group includes the former political prisoner, Lawyer Lev Lukyanenko. For participating in the Group, he has again been arrested and convicted.

authorities, emphasizing that government officials were responsible for human rights violations and that citizens had the right to discuss the question of these violations with them. Although most activists never expected the personal good will of those occupying positions of responsibility in the Soviet Union, we appealed to them because of the sphere of responsibility granted their office by legislation and reminded them that they were supposed to discharge these responsibilities in accordance with the law. Subsequently, the documents of the human rights movement were more widely distributed. Appeals were made to the international community, to Communist parties abroad, to international organizations, and even to foreign governments. Documents distributed directly to international organizations referred to specific violations of international agreements by the Soviet Union. The authors of these documents proceeded from a principle that I consider one of the most important in contemporary political philosophy—the principle of the state's international responsibility for human rights violations. This principle encompasses the state's responsibility before its partners in the community of nations, especially since in our time there are many international agreements for the protection of human rights.

The principle of the state's international responsibility and accountability assumed fundamental importance in the activity of the Helsinki groups. The Final Act of the Helsinki Conference, a document which unlike previous human rights documents approved by the United Nations elicited widespread public response in Europe, was the focal point for their discussions. The Soviet Union opposed the groups' insistence on such international responsibility on grounds that other states' interest in the problem of human rights in the USSR constituted interference in its internal affairs. Of course, this thesis contradicts the spirit and the letter of the Helsinki Accord and contradicts many other documents concerning international law.

The Helsinki groups limited their activity to discussing the protection of rights and informing states participating in the European Conference of human rights violations in the USSR. They did not assume the task of helping foreign countries actually interfere in the internal affairs of the Soviet Union. Their position was simply that the Helsinki Accord itself recognizes the human rights problem in each country as a matter of international concern. Their efforts were directed at supplying the Conference participants with documents that would facilitate an objective evalu-

ation of the extent to which each country, including the Soviet Union, was carrying out the agreements.

Apart from this primary activity—informing participating States of the situation in the USSR—many members of the Helsinki groups demonstrated through their own sacrifices the consequences of the Soviet Union's position on non-interference in internal affairs. The arrests and strict sentences of those who attempt to disclose the truth have shown the Conference participants and the world how the Soviet powers observe human rights. The valuable contributions made by the Helsinki groups studying the problems of the defense of international human rights became grounds for persecuting such outstanding people as Yuri Orlov, Aleksandr Ginzburg, Mykola Rudenko, Zviad Gamsakhurdia, Merab Kostava, Viktor Pyatkus, Aleksey Tykhy, Mikolay Matusevych, Miroslav Marynovych, Petro Vins, Levko Lukyanenko, Shagen Arutyunyan, Eduard Arutyunyan, Robert Nazaryan, Viktor Rtskhiladze, Anatoly Shchransky, Viktor Nekipelov, Yaroslav Lesiv, Vasyl Striltsiv, Vitaly Kalynychenko, Yuri Lytvyn, Oles Berdnyk, Petro and Vasyl Sichko, and Grigory Goldshtein.

## II. CRITICISM OF THE HUMANITARIAN PROVISIONS OF THE HELSINKI ACCORD

At the time the Helsinki Accord was signed, it only strengthened my skepticism that nations would increase their activity in the area of human rights protection. Indeed, since the language of the Helsinki Accord, at least with respect to humanitarian questions, is generally vague and superficial, it would be difficult to expect anything different. To be sure, the Helsinki Accord was approved not in the form of legal obligations but rather as a political document of good will. In principle, we may be glad that this good will was expressed by the parties involved, even though in such a vague form. Unfortunately, vague formulations in both legal and political international documents are the basis not only of future compromises, but also of future disagreements, particularly as each country becomes fully determined to insist on its own interpretation of an uncertain point.

I need have no doubt concerning the Soviet Union's determination to insist on its own interpretation of vague formulations in this Accord. What I have doubted, and am prepared to doubt now, however, is that the Western countries will show comparable determination in defending their humanitarian values and their

interpretations of ambiguities in the Helsinki Accord.<sup>5</sup> The history of the defense of international human values provides every reason to be skeptical. Despite some efforts to develop and approve international legal documents on human rights, on the whole the Western states have been rather passive in this area. On many occasions, members of the Soviet human rights movement have pointed out that Western countries have almost completely neglected existing procedures of international justice for discussing violations of human rights. For example, Western governments have failed to appeal cases alleging systematic violations by the Soviet Union of the Postal Convention guarantees and of the conventions on discrimination in the areas of education, labor, and employment. This criticism should not be interpreted as a grievance against these governments but rather as an observation. Governments are *not required* to ensure that their partners fulfil their international obligations; however, an observer may determine that they are not exercising their *right* to do so.

When the development of an international defense of human rights was being discussed, I always put my hope in the activity of social forces and considered government activity of secondary importance, deriving only from private constituent pressure. Although interested persons, including human rights activists in Moscow, may sometimes express their disappointment, I must acknowledge that social activity in this area has actually increased. Governmental activity, at least in the United States, has also apparently increased in recent times due to considerable pressure from social forces.

In evaluating the Helsinki Accord, it is very important to reiterate the point made earlier in this section that it is a political rather than a legal document. This characterization is accurate not only because the words themselves fail to create legal obligations for the states, but also because of the nature of its execution by each signatory. In a legal commentary, of course, it is natural

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5. Allow me to insert a somewhat ironical footnote. It is easy to imagine a Western politician bragging to his constituents that he *concluded* a new agreement with the USSR. This is considered a plus for him. But it is hard to imagine its being considered a plus that he *did not conclude* an agreement because he demonstrated firmness. Even if politicians remain firm and there is no agreement, they do not brag about it. They prefer to sign a meaningless communique, as was the case in Belgrade—anything to keep from demonstrating their firmness.



to speak of those provisions in the Accord which reflect the development of international law or legal practice of the states.

### A. *A False Symmetry*

As a political document, the Helsinki Accord bears the mark of a compromise, achieved with difficulty, between two groups of states with political systems vastly different in nature. This compromise is especially striking in the section on information. Many provisions in Basket III give the impression of being difficult to carry out in Eastern Europe, since the states exercise control over the dissemination of information. For example, the provisions include commitments to increase the dissemination of foreign publications by increasing the number of places where such publications are sold, the availability of subscriptions, and so forth. At the same time, execution of these articles by states with traditional freedom of information, including independent sources of information, will also present certain difficulties. It is completely incomprehensible how the government of the United States could increase subscriptions to foreign periodical publications or "facilitate the availability of these periodical publications during congresses, conferences, official visits and other international events and [for] tourists during the season. . . ."<sup>6</sup> Sources of information in the United States are not under the control of the government. All that the governments of the Western countries may do here is not hinder the dissemination of information from the Soviet Union.

President Ford noted judiciously that the United States does not jam radio broadcasts from the USSR and Eastern Europe, does not limit the dissemination of Eastern European newspapers or periodical publications or subscriptions to them, does not limit the showing of Soviet or Eastern European films, and does not restrict the work of journalists.<sup>7</sup> The Soviet Union, understandably, has already used this fact in advancing the argument that Eastern European societies are more open to the influence of Western culture than are Western societies to the influence of Eastern European culture. The Soviet Union and the Eastern European countries maintain that they have received a greater

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6. Basket II, § 2(a)(ii).

7. FIRST SEMI-ANNUAL REPORT BY THE PRESIDENT TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE *submitted to the HOUSE COMM. ON INTERNATIONAL RELATIONS* 47 (Dec. 1976).

amount of Western material, especially books and films, than the West has received from the East. Even though it is clear that the West has disseminated as much Eastern information as readers want, while in Eastern Europe only as much Western information is disseminated as the government permits, nevertheless the Soviet argument is a formal demand for reciprocity. In fact, the Soviet Union demands the following: the Eastern European governments will permit the dissemination of more Western information in their countries only if the Western governments force the public in their countries to buy more East European material. This demand is an instructive absurdity which illustrates the difficulties that may arise from unjustifiably symmetrical formulations of political accords. Agreements are concluded without considering that one of the sides will want to use the principle of reciprocity in a manner that contradicts the overall spirit of the document.

The Soviet Union may use this false symmetry in a manner broader than simply justifying its own attempts to avoid carrying out the agreements. For example, we may imagine the following dialogue: A representative of the United States explains that Soviet periodical publications are available to anyone who wants to read them in the United States but, according to law, the government does not have the right to interfere in the dissemination of books and magazines in the country. The Soviet representative answers: "The position of the United States no doubt contradicts the Helsinki Accord; however, the Soviet Union is prepared to meet the American side halfway and take into account these difficulties encountered by the American government, for the Soviet Union respects the laws and customs of the United States. But at the same time, the Soviet side expects the American side to respect the internal laws and customs of the Soviet Union. Thus, for example," he continues, "in the Soviet Union it is against the law to disseminate books and information not corresponding to Marxist-Leninist ideology and other countries should respect this Soviet law." Here, I believe, my imagination has run out. I cannot imagine what the United States representative would answer. True, there is no such law in the Soviet Union but the American would be hesitant to speak of that since there is a kind of international custom of believing partners in negotiations and of assuming that, in this case, the Soviet representative knows more about Soviet law. Actually, the Soviet representative may not even need to dream up this nonexistent law. He may play another wild card by citing the law prohibiting war propaganda. I am convinced

that the Soviet representative would have no difficulty linking candid reports of crimes and cases of violence with the law prohibiting war propaganda. I would like to note that on the basis of many other vague or unjustifiably symmetrical provisions in the Helsinki Accord it is possible to construct quite plausible examples of similar dialogues.

Not only does this symmetry in the proposed obligations lead to difficulties in achieving adequate implementation of the promises of the Helsinki Accord, but also the symmetry between existing rights and obligations, on which the Soviet Union loves to insist, is unfortunate. For example, in Basket III the governments "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."<sup>8</sup> This formulation is wrong in principle and in its consequences. In any discussion of rights, it is natural to assume that the inhabitant of a country is bound to fulfill his civil obligations if nothing is stated to the contrary in an international agreement. In Helsinki, only the protection of rights was the topic of conversation. The participating states had no intention of trying to broaden the duties of citizens. The negotiators would have been wise to avoid even mentioning duties, assuming with justification that any government is itself capable of insisting that obligations established by law be carried out and that in this regard it needs no help from international documents. In the above quotation from the Accord, the parties went beyond their original intentions of speaking only about rights, not obligations.

The formulation concerning family contacts is also poor because of its practical consequences. I can just imagine how it was conceived. The Western states, concerned because Soviet citizens requesting exit visas are driven from their jobs, expelled from universities, and have their rights limited in other ways, may have begun the negotiations insisting that the formulation quoted above deal only with the unaltered *rights* of such people. I can imagine that the Soviet representative expressed a willingness to concede this point but demanded the completion of this phrase by mentioning *responsibilities*, pointing out that a citizen not only enjoys rights but also bears responsibilities. I can imagine further that the Western negotiators, satisfied with the willing-

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8. Basket III, § 1(b).

ness of the Soviet side to compromise, considered the argument reasonable that a citizen has not only rights but duties as well and, therefore, agreed to include reference to duties in this provision. What was the result? For a long time the Soviet Union has attempted to discredit the idea of emigration in the eyes of its citizens. There can be no doubt that for a long time to come in Russia, those who have expressed a desire to emigrate will be subjected to oppression. Attempts will be made to isolate them from the loyal Soviet collective, for example, by expelling them from their jobs, or from the university. The Soviet Union may, more or less successfully, justify these measures in each individual case by citing special circumstances, such as a job involving real or contrived secrecy or the necessity to vindicate public outrage.<sup>9</sup>

I am convinced that the Soviet Union will not refrain from such oppression. It will discredit the idea of emigration in every possible way and resign itself to the fact that its opponents will be dissatisfied with its violations of this provision of the Helsinki Accord. The Soviet side may attempt to ameliorate the unpleasant impressions such violations create by pointing out that prospective emigrants still enjoy many rights in the Soviet Union. The Soviet government will be able to produce convincing figures showing how often these individuals received free medical care in Soviet clinics, how much money they received in the form of pensions, and so forth.

The reference to "obligations" in the Human Contacts Section of Basket III was included not because the Soviet Union feared prospective emigrants would refuse to pay taxes or would engage in other forms of civil disobedience, but rather as a device to circumvent the provisions. The point is that "obligations" can be defined by the state and therefore used to oppress individuals. One common method of persecuting those who have applied for emigration is to call them for military service. Quite often the emigration applicant may have had a legal deferment from military service as an employee of some institution or as a student. Since he is expelled from his job or place of learning after expressing

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9. We know, of course, that public outrage generally appears on order from above. The most brilliant example of the use of this justification for oppression was the refusal of television technicians, outraged at the appearance of Sakharov, to transmit his interview to the United States. I will not be surprised if at some time a Soviet representative cites this case to prove that the right to strike is freely exercised in the USSR.

his desire to emigrate, he loses the right to this deferment and is consequently subject to military service under the law. During attempts to discuss the brutal means of pressure on prospective emigrants, the Soviet Union will undoubtedly refer to the provisions in Basket III concerning "obligations of the applicant or of members of his family."

### B. *Specific Provisions of The Accord*

In reviewing the concrete provisions of the Accord, I will generally avoid commenting on clauses beginning with permissive phrases such as the participating states will "favorably consider" or "deal in a positive and humanitarian spirit with" certain issues. In reality these promises mean absolutely nothing, except perhaps that bureaucrats will be in a well-disposed frame of mind when discussing whether to grant a visa or deny it.<sup>10</sup> It should be remembered at the same time, however, that mention of good will is important as an expression of the spirit of the Accord.

#### 1. The Declaration of Principles

The most important provision for the protection of human rights is Principle VII of Basket I of the Accord which discusses respect for human rights and fundamental freedoms. The promise to respect values such as freedom of religion and conviction and the rights of national minorities is openly proclaimed. Most importantly, it is declared that respect for human rights and fundamental freedoms is a vital factor for peace, a statement which discounts the Soviet claim that other countries' interest in human rights in the USSR constitutes interference in its internal affairs.

Many important basic rights are not specifically mentioned in Principle VII and, instead, reference is made to the Universal Declaration of Human Rights. This reference would have been sufficient, but, unfortunately, the negotiators added guarantees of specific rights which effectively weakened prospects of defending an unmentioned right based merely on reference to the Universal Declaration of Human Rights. For example, the freedom to leave

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10. Perhaps this irony is unjustified and instead it should be considered a success that the Soviet Union agreed to confirm the existence of the problem, even in this hortatory form. I would have written in precisely that vein if we were referring to an agreement concluded ten rather than five years ago. At this point it is natural to expect more improvement.

one's country is not mentioned in Principle VII, although later in the Accord very moderate promises are taken up in detail, *e.g.*, facilitation of departure to reunite families. Although a government which does not wish to grant freedom to leave may invoke this omission in denying applications for emigration, nevertheless the general provisions found in Principle VII and the reference to the Universal Declaration of Human Rights show quite distinctly the *spirit in which* this agreement should be interpreted.

## 2. Contacts and Regular Meetings on the Basis of Family Ties<sup>11</sup>

The Soviet Union's promise to examine applications for temporary journeys without regard to the country of destination and to follow the existing order for legalization of documents and visas in the same spirit, can be interpreted as a promise to establish a uniform procedure for validating exit permits, regardless of what country the applicant intends to visit. I do not believe that this promise, stated so clearly in the next Basket III provision on "Reunification of Families," can be realized in the foreseeable future. Its fulfillment must be preceded by a solution to the problem of free emigration, if only for those who have relatives abroad. The procedures for granting exit visas from the USSR to the socialist countries and to Finland were already simplified considerably by agreements to extradite those who do not return. For a long time, the Soviet Union has failed to distinguish between those traveling to socialist countries and those traveling to so-called capitalist countries. In recent times, however, it has been attentive to the dangers of infection of its citizens by bourgeois ideology and has required special scrutiny of applications for travel to "capitalist countries."

The promise that applications will be examined within a reasonable time with acceptable fees is one on which some progress may be made. The promise to grant documents and visas in "cases of urgent necessity—such as serious illness or death," is perfectly feasible for the Soviet Union today, provided there is no obligation to actually grant permission. In any event, the promise to give priority treatment to the seriously ill, even if it is a refusal, is humane in that it reduces the period of anxious waiting.

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11. Basket III, § 1(a).

### 3. Reunification of Families<sup>12</sup>

Practically speaking, the Basket II provisions on "Reunification of Families" as well as those on "Contacts and Regular Meetings on the Basis of Family Ties," should refer only to the United States and those few CSCE participants that did not ratify the United Nation's Human Rights Covenants. The Soviet Union and other nations that have signed the Covenants have already guaranteed their citizens the right to travel abroad.<sup>13</sup>

We know, however, that the problems of Soviet and other East European citizens wishing to travel abroad to reunite their families are acute, despite the fact that these countries ratified the Covenants. It should be noted that the promise to review requests for reunification as quickly as possible, with reduction in fees where necessary, is not only perfectly feasible in the Soviet Union, but, as noted by the President of the United States,<sup>14</sup> is being observed. In compliance with the Helsinki Accord, the USSR no longer collects fees from those whose applications to travel abroad are denied. The time taken to refuse an application has been reduced to six months—apparently in response to the promise to "deal with applications in this field as expeditiously as possible."

One provision that is extremely unrealistic with regard to the Soviet Union states: "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." It is doubtful that this promise will be carried out by the

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12. Basket III, § 1(b).

13. United Nations Covenant on Civil and Political Rights, art. 12(2), G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N.Doc. A/6316 (1966). Let me note here an original peculiarity of the Helsinki Accord. The participants obliged themselves to observe the Human Rights Covenants, *if they were bound by them* (Principle VII). This wording indirectly emphasizes the nonlegal nature of the document. Also, the Helsinki document does not affect signatories' obligations under any other agreement (Principle X). The states have obliged themselves in a document with no legal force to observe the provisions of documents which have become law for them. Knowing the dialectical devices of Soviet propagandists, I will not be surprised if someone says, "Yes, of course we ratified the Human Rights Covenants, and in the Helsinki Accord we committed ourselves to observing them; but this is not a legal obligation, since the Helsinki document merely has the status of a declaration."

14. SEVENTH SEMI-ANNUAL REPORT BY THE PRESIDENT TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE, 62 Dep't State Special Rep. 13 (1979).

Soviet Union in the near future. The problem is not that an application for emigration takes so long to review but that while it is pending the applicant should have the right to visit his family and return to await permission to emigrate. If a person is refused emigration to reunite his family, then he will hardly be allowed to visit abroad. On the other hand, I know of very few cases where someone who had previously received permission to visit abroad was subsequently refused permission to emigrate. On the contrary, many emigrate without first receiving permission for free visitation. Judging by practice, it is much easier for the Soviet Union to permit emigration than visits abroad. Where Soviet citizens wish to visit relatives abroad who are former Soviet citizens, the bureaucrats openly tell them that such journeys are prohibited.

In connection with the reunification of families, the Soviet government has adopted two rather opposite approaches. On the one hand, the term "family" is sometimes interpreted extremely narrowly.<sup>15</sup> Officials explain in some cases that a relative whom a Soviet citizen wishes to visit is not sufficiently close. A case has been cited in which Soviet bureaucrats explained their denial of an application to emigrate by stating that they could not *violate* the Helsinki Accord by allowing someone to visit a relative who was not sufficiently close. On the other hand, since there is a clear effort in the USSR not to recognize the right to emigrate, the Soviet Union has in some cases interpreted the term "family" rather broadly, preferring to label the request "family reunification." On occasion, people wishing to emigrate receive invitations from very distant relatives abroad which the government often approves.

The Soviets' dual interpretation of "family" raises the question of why this formal game of family reunification is necessary at all. The legal doctrine of family reunification is normally significant in connection with permission to *enter* a country, entry usually being considered a privilege, not a right. It would seem that the doctrine of family reunification should not be of any significance in connection with *leaving* a country since emigration is recognized as a universal human right. It is understandable, however, why both West and East prefer to discuss the problems of emigration in terms of family reunification. For the West, since

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15. This point was mentioned by President Carter in his report to the Commission on Security and Cooperation in Europe. *Id.*



World War II the issue of family reunification has been easier to address by referring to broad human values and social good rather than merely to the freedom to leave one's country. Use of this terminology allows Western negotiators to avoid demands that seem excessive to the Soviet Union. For the Soviet Union, it is the only acceptable terminology for present discussions of emigration simply because the policies allowing permission to emigrate for family reunification must not contradict too seriously the more general policy of discrediting the idea of emigration. For the Soviet Union, abandoning this latter policy would simply open the borders for the exchange of people and information. Fulfillment of this hope should not be expected in the foreseeable future.

In summary, if Soviet authorities refrained from oppressing those who wish to emigrate, it could lead to a sharp increase in the number of emigration applicants. An increase in applications would itself force the authorities to stand less in the way of emigration. This reaction could only facilitate obtaining permits for visits abroad. Ultimately a sharp increase in foreign travel would certainly lead to an influx of Western ideas and information.

Although I understand that the Helsinki Accord speaks of family reunification, I must mention as an important defect that nothing is said concerning the rights of individuals or groups to emigrate. For many individuals and groups at the present time, emigration is the only means for solving their conflicts with the existing way of life in the Soviet Union. This problem is more widely known with regard to individuals. More recently, however, several religious communities that are suppressed in the Soviet Union have communicated their wish to emigrate to the outside world.

#### 4. Marriages Between Citizens of Various States<sup>16</sup>

In this area, progress in the Soviet Union was achieved long before the Helsinki Accord was signed. For example, the bans on marrying foreigners had already been removed. It is difficult to trace the extent to which it has become easier to marry a foreigner in the Soviet Union during the last five years. Apparently, there have been more such marriages in the Soviet Union in recent times, although it is known that the authorities hinder regis-

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16. Basket III, § 1(c).

tration of marriage with a foreigner as much as possible.

An arbitrary period of six months must pass from the time an application for registering a marriage is submitted until the time when the marriage is actually registered. The result is that before the requisite time is up, the foreigner must leave the Soviet Union since his visa has expired. It is even said that the time of a visa's validity is often artificially shortened by decree of the authorities. In other cases, Soviet authorities have refused foreign citizens re-entry into the Soviet Union if it was known that they intended to marry a Soviet citizen. Since these legal matters affect foreigners, foreign governments and the press are rather well informed concerning such cases. Unfortunately, however I do not believe there is reason to hope for any serious change in Soviet policy in this area.

#### 5. Travel for Personal or Professional Reasons<sup>17</sup>

It is quite possible to expect progress in the areas of "simplification" and "flexible administration" of exit and entry procedures by the Soviet Union.<sup>18</sup> The promise to facilitate procedures for foreign citizens traveling within the USSR is an area in which the Soviet Union may show gradual progress for some time to come, since the territories that are forbidden for foreign travelers without special permits or status are extensive. It seems that there has been progress in this area following the Helsinki Accord.

#### 6. Religious Activities and Contacts

It is interesting to note that the states confirmed that "religious faiths, institutions, and organizations, practicing within the constitutional framework of the participating States, and their representatives can, in the field of their activities, have contacts and meetings among themselves and exchange information."<sup>19</sup> This provision is extremely important for the protection of rights in the USSR, when interpreted with proper formalism. Note that it

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17. Basket III, § 1(d).

18. *Id.* It is completely incomprehensible what "flexible administration" of exit and entrance procedures means. Such a phrase is impossible to define in legal terminology. If political flexibility is meant, then one can imagine that under precisely the same conditions and initial facts, some will be given an exit and entry visa while others will not. If this assessment is accurate, then I am not sure the Soviet Union needs more flexibility.

19. Basket III, § 1(d).

speaks of religious organizations acting within the *constitutional framework* of the participating states. It is reasonable to interpret this phrase as a requirement that the activity of these groups not conflict with the Soviet Constitution.<sup>20</sup> However, the government's treatment of religious organizations is not determined by the articles of the Constitution but by the many instructions, issued in clear contradiction to Soviet constitutional guarantees.<sup>21</sup> According to these instructions, it seems that some religious organizations that are not recognized by the state are suppressed to a greater extent than religious cults that are recognized by the state. At the present time, religious organizations are generally deprived of legal contacts with other members abroad.<sup>22</sup>

If one of the Western representatives tried to direct Soviet attention to the formal discrepancy between the constitutional framework mentioned in the Helsinki Accord and the unpublished instructions, I believe the Soviet representative would insist that the term "constitutional framework" means: "In accordance with the constitution and with laws that have not been declared unconstitutional by established procedures." While such a response sounds plausible, who would recall that in the Soviet Union there are no procedures at all for declaring a law unconstitutional? With regard to declaring an instruction unlawful, this is made difficult primarily because instructions are not published. Interested parties have no procedure for taking issue with such instructions.

## 7. Tourism, Youth Conferences, and Sports<sup>23</sup>

These provisions do not impede the Soviet Union in completely controlling contacts between its citizens and foreigners. Consequently, Soviet legal practice does nothing to prohibit progress in this area.

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20. The Constitution of the USSR guarantees freedom of conscience and the right of religious cults to exercise their religion.

21. Many of these instructions are not published.

22. One Baptist, Sklyarenko, attempted to contact co-religionists abroad. After correspondence was systematically withheld and the Soviet postal service told him his letters were "lost in internal processing," he wrote a letter to Chairman Brezhnev, containing the characteristic request for him to give instructions so that at least one of his letters might be allowed out of the country.

23. Basket III, § 1(e), (f), and (g).

### 8. Information<sup>24</sup>

I do not foresee that the Soviet Union will have any difficulty observing this section to the letter. It contains virtually nothing to hinder that country from continuing its policy of maximum control over information from abroad. The resolve to develop "mutual understanding between the participating States" found in the preamble to this section may always be interpreted by the Soviets in the "proper" manner. The promise to help improve the availability to the public of foreign publications, especially periodicals, may well lead to gradual progress without jeopardizing the usual state control of information. For example, in February 1976, only forty copies of the French newspaper *Le Monde* and *The London Times* were put on public sale in the Soviet Union; only sixty copies of the *Paris International Herald Tribune* were sold openly.<sup>25</sup> I do not believe that these figures, if they refer to truly public sales, are any more reliable than the figure stating that 60,000 copies of the USIA monthly publication *America Illustrated* are distributed in the USSR.<sup>26</sup> Even based on these figures, President Ford concluded in his report to the Commission on Security and Cooperation in Europe that these newspapers are practically unavailable to the average Soviet citizen.

Although obstacles created by the Soviet Union to hinder citizens in their attempts to establish a free exchange of information, uncontrolled by the government, certainly contradict the spirit of the Helsinki agreements, it would be difficult to discuss this problem in reference to concrete provisions of the Helsinki Accord. At the same time it must be acknowledged that if the Soviet Union, in conformity with the spirit of the Helsinki Accord, expands its exchange of information with the Western countries at all, a gradual positive effect may be to increase the Soviet public's knowledge of at least some aspects of Western life.

In the area of improved working conditions for journalists,<sup>27</sup> some measures have already been taken by the Soviet Union. They were noted by President Ford at the same time that he cited cases of oppression against foreign journalists who reported unfavorably about the authorities.<sup>28</sup> Despite some repressive mea-

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24. Basket III, § 2.

25. *Supra* note 7 at 47.

26. *Supra* note 7 at 48.

27. Basket III, § 2(c).

28. *Supra* note 7 at 50.

tures, the practice of granting foreign journalists multiple entry-exit visas may have a favorable effect in that journalists need not fear each time they apply that permission for entry may be denied. Of extreme importance is the fact that in the Helsinki Accord the states affirm that "the legitimate pursuit of their professional activity will neither render journalists liable to expulsion nor otherwise penalize them." This norm may bring positive results, although it may also be used by the authorities to accuse unfavorable journalists of illegal activities. The accusation that three United States journalists were working with the Central Intelligence Agency (CIA) is an example of misuse of this provision; fortunately, the journalists were charged only with being undesirable to society.<sup>29</sup>

One provision in this section of the Helsinki Accord is especially bewildering: "If an accredited journalist is expelled, he will be informed of the reasons for this act and may submit an application for re-examination of his case." We do not live in such harsh times that a foreigner would be deported without being informed of it,<sup>30</sup> and even before the Helsinki Accord, anyone in the Soviet Union could *request* a review of any decision he pleased. No high-level conference was needed for this guarantee. In fact, it does nothing more than emphasize what a step back the Helsinki Accord is from similar norms in the United Nations Human Rights Covenants. Article 13 of the Covenant on Civil and Political Rights states with regard not only to accredited journalists, but also to foreigners in general:

An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for this purpose before, the competent authority of a person or persons especially designated by the competent authority.<sup>31</sup>

I do not believe the reader is in need of my comments to under-

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29. *Supra* note 7 at 50. The journalists were Alfred Friendly, Jr., George Krimsky, and Christopher Wren.

30. While it was possible to *deport* the political prisoner Bukovsky without informing him, it is not possible for a foreigner, under the Accord.

31. United Nations Covenant on Civil and Political Rights, art. 13, *supra* note 13.

stand how far the Helsinki Accord retreated from the guarantees of the Covenant in this matter. I emphasize that according to the articles of the Covenant, the decision must be made *in accordance with the law*. In addition, the foreigner has the *right*, unless imperative considerations of national security require otherwise, not only to appeal the decision, but *to be represented* for this purpose before the proper authority. Although the Covenant does not provide a detailed procedure for such appeal, it is nevertheless assumed that a procedure exists.

### 9. Cooperation in the Fields of Culture and Science<sup>32</sup>

The provisions of these sections of the Accord do not present any serious difficulties for the Soviet Union in continuing its practice of international cooperation in the fields of culture and education. These areas are under exclusive state control.

## III. CONCLUSIONS

It may seem to the reader of this brief commentary on some of the humanitarian provisions of the Helsinki Accord that they have produced little progress in international cooperation. I repeat that this is not a legal but a political document; yet, I have commented on it as if it were a legal document. In a legal document, apart from the formal interpretation of the provisions, apart from the letter of the law, the spirit of the document is also extremely important. This is all the more true of a political document which, as has been stated repeatedly, was composed precisely because the parties were full of good will toward the development of international cooperation and the joint defense of humanitarian values. Neither discussions nor concrete cooperative efforts of the states should be limited by the individual formulations of the Accord itself. They should instead follow the general spirit of the Accord proclaimed when it was concluded. Provided these express intentions were not merely tools of propaganda, it will be possible, if not to achieve rapid and substantial results, at least to carry on serious discussions of principle. Those difficulties that arise during a legalistic reading of individual provisions will be no hindrance to the realization of good intentions. Pointing out these possible difficulties and criticizing the formulations of these provisions is necessary so that as the participants of

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32. Basket III, § 3, 4(c).

the forthcoming Madrid Review Meeting become filled with good intentions, they will write documents on a legal level higher than that of the Helsinki Accord.