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NOTES AND COMMENTS

The Fine Line Between the Enforcement of Human Rights Agreements and the Violation of National Sovereignty: The Case of the Soviet Dissidents

I. INTRODUCTION

The plight of Soviet dissidents¹ has captured the sympathies and interest of Americans for a number of years. These dissidents have consistently received prominent coverage in the nation's major newspapers throughout the last decade,² and they have been the object of much political debate between the United States and the Soviet Union.³ Most recently, the particular case of the Sakharovs has generated tremendous public interest and concern in the United States.⁴

1. For the purpose of this analysis, "dissident" shall mean any person (1) who places himself in opposition to a policy or policies of the Communist Party of the Soviet Union which the Party defines as important, and (2) who makes his dissention known beyond his immediate family. This definition is tolerably consistent with the definition of "dissident" given by the Soviet authorities: "renegades . . . the open opponents of socialism—insignificant little groups of people who represent no one and nothing, far from the Soviet people, and who exist solely because they are supported, paid and extolled by the West." *Chto skryvayets' a za shumikhoy o "pravakh cheloveka"* (What's hidden behind the fuss about "human rights"), *Pravda*, Feb. 12, 1977, at 4, col. 1. This definition is also consistent with Amnesty International's definition of a "prisoner of conscience": "men and women detained anywhere for their beliefs, colour, sex, ethnic origin, language or religion, provided they have not used or advocated violence." AMNESTY INTERNATIONAL REPORT 1983, Amnesty Int'l Pub. No. POL 01/01/83, title page (1983) [hereinafter cited as AMNESTY INTERNATIONAL REPORT].

2. For instance, in three months chosen at random from the past decade, the *Los Angeles Times* printed a total of eleven articles, primarily in the first section. *L.A. Times*, Jan. 1, 1976, sec. I, at 4, col. 1; *id.* Jan. 7, 1976, sec. I, at 25, col. 6; *id.* Jan. 11, 1976, sec. I-A, at 5, col. 2; *id.* Jan. 16, 1976, sec. I, at 2, col. 1; *id.* Jan. 20, 1976, sec. I-A, at 7, col. 1; *id.* Oct. 17, 1980, sec. V, at 14, col. 1; Conine, *Chafing Under the Soviet Paw*, *id.* Oct. 27, 1980, sec. II, at 9, col. 1; Gillette, *Soviet Jewish Dissident Sentenced, Friends Say*, *id.* Nov. 15, 1981, sec. I, at 22, col. 1; Gillette, *Ethnic Germans Arrested for Protest In Moscow*, *id.* Nov. 17, 1981, sec. I, at 12, col. 1; *id.* Nov. 17, 1981, sec. I, at 12, col. 2; Wood, *Armenian Church Thrives Despite Soviets*, *id.* Nov. 27, 1981, sec. I-A, at 10, col. 1.

3. Most recently, during Foreign Minister Andrei Gromyko's visit to the United States in October, 1984, both President Ronald Reagan and former Vice President Walter Mondale presented him with lists of dissidents about whom they were concerned. See *Getting Together But Staying Apart*, *NEWSWEEK*, Oct. 8, 1984, at 18, 21.

4. Dr. Sakharov is a prominent Soviet Physicist and Nobel Peace Prize laureate whose

Most Americans, rooted in the constitutional precepts of individual freedom, have sympathy for any group of people whose individual rights are not protected. Americans often turn to their most representative branch of government, the United States Congress, whenever they want their concern for individual rights reflected in foreign policy. Congress has persistently conveyed public concern to the Kremlin by resolution, letter, and personal dialogue.⁵

The Soviet Union considers these governmental policies contrary to international law⁶ since they are an intervention in Soviet internal affairs.⁷ Many Americans, on the other hand, believe the United States has a legal right, as well as a moral duty, to enforce the human rights clauses of international agreements, and that this justifies Congressional action.⁸ The conflict between these two interpretations of international law will be the fundamental focus of this Comment.

The Soviet Union is a party to several international agreements which contain human rights clauses. This Comment will begin with an analysis of the relevant provisions of these agreements, and will provide an overview of their historical background. Alleged Soviet violations of these agreements will be documented. From this perspective, the Comment will then analyze the legal right of the United States to act on behalf of Soviet dissidents. This particular analysis requires an understanding of the Soviet view of the human rights granted by these agreements, as well as their views on national sovereignty and self-determination in this field. Finally, this Comment will

efforts were instrumental in the development of the Soviet hydrogen bomb. Recently, his views on the use of nuclear weapons have led to conflicts with the Soviet regime. His wife's illness and her desire to emigrate to the West for medical treatment have further intensified this conflict, ultimately leading to a hunger strike by Sakharov. One way in which the American public has responded is by generating grass-roots petitions on Sakharov's behalf, culminating in Sakharov Day, 1983. See Eaton, *Soviet Chills U.S. Idea of Rights Link to Arms*, N.Y. Times, May 19, 1983, at A9, col. 1. Scientists have been especially active on Sakharov's behalf. See Austin, *Sakharov Telegrams Made Public*, N.Y. Times, Mar. 5, 1980, at A4, col. 1.

5. One of the most recent personal contacts was a Congressional delegation's visit to Moscow in January of 1984. L.A. Times, Jan. 17, 1985, sec. I, at 7, col. 1. The Soviet Union, feeling this pressure from Congress, has gone so far as to blame Congress for President Jimmy Carter's speeches on human rights. See Vishnevskiy, *Contrary to Logic, Contrary to Facts*, Pravda, June 11, 1977, at 5, col. 2.

6. For a discussion of Soviet views on international law, see Tunkin, *The Contemporary Soviet Theory of International Law*, 31 CURRENT LEGAL PROBS. 177 (1978).

7. See Vishnevskiy, *supra* note 5.

8. See, e.g., Henkin, *Human Rights and Domestic Jurisdiction*, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21 (T. Buergenthal ed. 1977); Buergenthal, *Domestic Jurisdiction, Intervention, and Human Rights: The International Law Perspective*, HUMAN RIGHTS AND U.S. FOREIGN POLICY 111 (Brown & MacLean eds. 1979).

discuss some of the traditional options pursued by the United States to counter Soviet human rights violations, and will suggest some further options, with an eye towards discovering how the United States can cause the Soviet Union to significantly change her treatment of dissidents.

II. BACKGROUND OF THE INTERNATIONAL BILL OF HUMAN RIGHTS AND OF THE HELSINKI FINAL ACT

A. *The International Bill of Human Rights*

The Soviet Union is a party to three relevant human rights treaties: the Universal Declaration of Human Rights,⁹ the International Covenant on Economic, Social and Cultural Rights,¹⁰ and the International Covenant on Civil and Political Rights.¹¹ Known together as the "International Bill of Human Rights," these three agreements are the most comprehensive and significant documents of the United Nations on the issue of human rights.¹² In addition, the Final Act of the Conference on Security and Co-operation in Europe of August 1, 1975¹³ (Helsinki Final Act), will be considered. The Helsinki Final Act is the most recent international agreement discussing a broad range of human rights to which the United States and the Soviet Union are both parties.¹⁴

9. G.A. Res. 217A(III), U.N. Doc. A/810 (1948) [hereinafter cited as Universal Declaration].

10. G.A. Res. 2200(XI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966) [hereinafter cited as Social Covenant] (entered into force on Jan. 3, 1976, in accordance with Article 27). The United States has not yet ratified this covenant.

11. G.A. Res. 2200(XI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966) [hereinafter cited as Political Covenant] (entered into force Mar. 23, 1975, in accordance with Article 49). The United States has not yet ratified this covenant.

12. These agreements are singled out in the Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, also known as the Helsinki Final Act [hereinafter cited as Helsinki Final Act], "Questions Relating to the Security in Europe," part (a), Section VII (Basket I), reprinted in HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 161 (T. Buergenthal ed. 1977). See also HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev.1 (1978) (represents U.N. practice).

13. Helsinki Final Act, *supra* note 12. Both the United States and the Soviet Union have signed this Act. However, it is not legally binding and therefore not open to ratification. Its complete text may be found in HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS 135-203 (A. Henkin ed. 1979). Every country in Europe, with the exception of Albania, was a party to the Final Act, as were the United States and Canada.

14. For instance, the 1975 Declaration on the Rights of Disabled Persons, G.A. Res. 3447(XXX), 30 U.N. GAOR C.3 (2433d mtg.) at 921, U.N. Doc. A/10284/Add.1 (1975), and the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452(XXX), 30

The International Bill of Human Rights has its origins in the 1945 United Nations Charter (Charter) drawn up at the end of World War II. Article 1, section 3, of the Charter provides that one purpose of the United Nations shall be "[t]o achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . ."¹⁵ In addition, Article 56 of the Charter pledges all member states "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."¹⁶ Article 55 encourages the promotion of "universal respect for, and observance of" the human rights mentioned in Article 1, section 3.¹⁷

Recognizing that the terms used in the 1945 Charter had been left undefined,¹⁸ the United Nations General Assembly passed Resolution 217A(III), known as the Universal Declaration of Human Rights (Universal Declaration), in 1948.¹⁹ This document specifically defined the "fundamental freedoms" referred to in the first article of the Charter.

The nature of these freedoms seems to reflect the dominance of the United States in world affairs at that time. For example, most of the rights in the Universal Declaration parallel those in the United States Bill of Rights. Freedom of "thought, conscience and religion,"²⁰ and of "opinion and expression,"²¹ are guaranteed, as is the freedom to "seek, receive and impart information and ideas through any media and regardless of frontiers."²² The Universal Declaration states that each person has a "right to freedom of peaceful assembly and association,"²³ and to "freedom of movement . . . [and the] right to leave . . . and return to his country."²⁴

U.N. GAOR C.3 (2433d mtg.) at 624, U.N. Doc. A/10408 (1975), as well as other international agreements, are not discussed.

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

16. *Id.* art. 56.

17. *Id.* art. 55, para. (c).

18. Leary, *The Implementation of the Human Rights Provisions of the Helsinki Final Act—A Preliminary Assessment: 1975-1977*, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 111, 112 (T. Buergenthal ed. 1977).

19. Universal Declaration, *supra* note 9.

20. *Id.* art. 18; U.S. CONST. amend. I.

21. Universal Declaration, *supra* note 9, art. 19.

22. *Id.*

23. *Id.* art. 20.

24. *Id.* art. 13.

The Universal Declaration also protects the individual against "arbitrary interference with his privacy, family, home or correspondence,"²⁵ and against "torture or . . . cruel, inhuman or degrading treatment or punishment."²⁶ The individual must be given a fair trial²⁷ at which he is innocent until proven guilty,²⁸ and may not be arbitrarily arrested, detained, or exiled.²⁹ Furthermore, the right to seek asylum from persecution is established.³⁰ This emphasis upon individual political, religious, social, and economic rights was a reaction to the human rights violations which occurred immediately prior to and during World War II.³¹

The Charter had also established a Commission on Human Rights to submit reports, proposals, and recommendations on various topics within the field of human rights, and to develop an International Bill of Rights based upon those rights granted in the Charter.³² Because these rights fell into two broad categories, the Commission felt it would be best if each group of rights were put into separate covenants.³³ The final result was thus two covenants: the International Covenant on Civil and Political Rights (Political Covenant)³⁴ and the International Covenant on Economic, Social and Cultural Rights (Social Covenant).³⁵

These Covenants reflect a much more sophisticated and precise elaboration of human rights than the earlier concept of "fundamental freedoms" enunciated in the Charter, making it easier to identify specific human rights violations. This sophistication is best evidenced by the provisions of the Political Covenant. It replaces the Universal Declaration's basic provisions guaranteeing freedom from arbitrary

25. *Id.* art. 12.

26. *Id.* art. 5.

27. *Id.* art. 10.

28. *Id.* art. 11.

29. *Id.* art. 9.

30. *Id.* art. 14.

31. See Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, HUMAN RIGHTS THIRTY YEARS AFTER THE HELSINKI DECLARATION 21 (B.G. Ramcharan ed. 1979). See also the Preamble of the Universal Declaration, which provides in part: "[w]hereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind. . . ." Universal Declaration, *supra* note 9, preamble.

32. Hoare, *The UN Commission on Human Rights*, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 59 (E. Luard ed. 1967).

33. *Id.*

34. See Political Covenant, *supra* note 11.

35. See Social Covenant, *supra* note 10.

arrest and the right to a fair trial with an article detailing the right to liberty and security of person, the right to be informed of any criminal charges made, the right to a speedy trial or to immediate release, and the right to compensation in the event of unlawful arrest or detention.³⁶ The Political Covenant also adds freedom from involuntary scientific experimentation to the Universal Declaration's provision against torture.³⁷

The Political Covenant's provision for the right of peaceful assembly and association elaborates the Universal Declaration's simple statement that "[e]veryone has the right to freedom of peaceful assembly and association."³⁸ The Political Covenant divides this right into two separate sections.³⁹

Significantly, the Political Covenant incorporates a so-called "escape clause"⁴⁰ into its freedom of expression provision that enumerates the restrictions which may be imposed upon the enjoyment of this freedom. It provides that the rights may be curtailed if necessary for "national security or public safety, public order . . . the protection of public health or morals or the protection of the rights and freedoms of others."⁴¹

Similarly, the Political Covenant combines the Universal Declaration's freedom of expression and freedom to seek, receive and impart information regardless of frontiers,⁴² into a more precise provision giving "the right to hold opinions without interference"⁴³ a special, preliminary place. This section also includes an escape clause similar to the limitations placed upon the freedom of expression.⁴⁴ The Political Covenant provision granting the freedom of movement and repatriation also adds this same escape clause.⁴⁵

Both the Political and Social Covenants have provisions which state that the Covenants' provisions may not be used to imply "any right to engage in any activity or to perform any act aimed at the

36. Political Covenant, *supra* note 11, art. 9.

37. *Id.* art. 7.

38. Universal Declaration, *supra* note 9, art. 20.

39. Political Covenant, *supra* note 11, arts. 21, 22.

40. An "escape clause" will be construed to refer to any clause in a human rights agreement which limits the full enjoyment of any rights provided for elsewhere in the agreement.

41. Political Covenant, *supra* note 11, art. 19(3)(b).

42. *Id.* art. 19(2).

43. *Id.* art. 19(1).

44. *Id.* art. 19.

45. *Id.* art. 12(3).

destruction of any of the rights or freedoms recognized herein.”⁴⁶ These provisions become most significant when viewed together with the Covenants’ identical clauses stating that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁴⁷ As will be discussed below, these provisions provide the Soviet Union with one basis for their interpretation of international law. The Soviet Union can and does claim that discussion of Soviet human rights violations is interference with the Soviet Union’s political policy.⁴⁸

B. *The Helsinki Final Act*

The Helsinki Final Act, signed on August 1, 1975, is another principal human rights agreement signed by the USSR. This Act is not legally binding, as it is a “Declaration on Principles,” not a treaty.⁴⁹ It flowed from Soviet efforts to obtain formal recognition of the boundaries in Eastern Europe resulting from World War II.⁵⁰ The Helsinki Final Act arises from a rather problematic political situation: no peace treaty had ever been drawn up at the end of World War II in Europe, the various arrangements regarding former German territory had led “to solutions of debatable effect,” and Europe had become an arena for East-West ideological confrontation.⁵¹ In addition, then Soviet Premier Leonid Brezhnev was determined to present the conference which generated the Helsinki Final Act (called the Conference on Security and Co-operation in Europe) as a great success for Soviet multilateral diplomacy.⁵² Confronted with the insistence of the Western and neutral states, Premier Brezhnev was compelled to concede points on humanitarian contacts so that the

46. *Id.* art. 5(1).

47. *Id.* art. 1.

48. See text accompanying notes 125-36.

49. “[T]he participating states did not intend to bind themselves legally, and they expressly noted that the Declaration on Principles Guiding Relations between Participating States does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements.” Bastid, *The Special Significance of the Helsinki Final Act*, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 11, 13 (T. Buergenthal ed. 1977).

50. Scrivner, *The Conference on Security and Cooperation in Europe: Implications for Soviet-American Detente*, 6 DEN. J. INT’L L. & POL’Y 122, 148 (1976).

51. Bastid, *supra* note 49, at 15.

52. Jonathan & Jacques, *Obligations Assumed by the Helsinki Signatories*, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 43, 45 (T. Buergenthal ed. 1977).

Conference would not fail altogether.⁵³ The Eastern bloc therefore gave humanitarian and cultural questions a special place on the Conference's agenda.⁵⁴ This part of the agenda became known as "Basket III."⁵⁵

Basket III is one of the three topical groups into which the Act's provisions are organized. Basket I is entitled "Questions Relating to the Security in Europe," and Basket II is called "Co-operation in the Fields of Economics, of Science and Technology, and of the Environment." Basket III of the Helsinki Final Act is entitled "Co-operation in Humanitarian and Other Fields." It outlines plans in various areas, such as family reunification and exchange of scientific information, designed to "facilitate freer movement and contacts, individually and collectively;"⁵⁶ "facilitate the freer and wider dissemination of information of all kinds . . . and the exchange of information with other countries;"⁵⁷ and "facilitate . . . the further development of exchanges of knowledge and experience."⁵⁸ The spirit of Basket III is perhaps more significant than its vague provisions dealing with its implementation: in Basket III, the participating states "[d]etermine . . . to co-operate among themselves, irrespective of their political, economic and social systems, in order to create better conditions in the above fields."⁵⁹ This language exemplifies the spirit of detente prevalent in 1975.

Three clauses contained in Basket I are also of importance for the analysis of human rights. In the most important of these, the participating states reaffirm that:

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

53. *Id.*

54. *Id.*

55. *Id.* Because this last basket was the price the Soviet Union paid for the recognition of Eastern European boundaries, "an unyielding insistence on compliance with these provisions was imperative to maintain the bargain." Buergenthal, *International Human Rights Law and the Helsinki Final Act: Conclusions*, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 3, 9 (T. Buergenthal ed. 1977).

56. Helsinki Final Act, *supra* note 12, "Co-operation in Humanitarian and Other Fields," sec. 1, preamble (Basket III).

57. *Id.* sec. 2, preamble.

58. *Id.* sec. 4, preamble.

59. *Id.* "Co-operation in Humanitarian and Other Fields," preamble.

in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.⁶⁰

Given the fact that the United States Senate has not ratified the International Covenants, this clause is critical if the United States is to have a legal basis for discussing the implementation of these Covenants with the Soviet Union, because the United States has signed this Act.⁶¹

There are two other clauses in the Helsinki Final Act which are important for this analysis. These are the clauses guaranteeing the right of self-determination of all peoples, under which each state may determine its own internal political status,⁶² and the right of sovereign equality of all states, which includes territorial integrity, political independence, and the right of each state to determine its own laws.⁶³

III. SOVIET VIOLATIONS OF THE INTERNATIONAL BILL OF HUMAN RIGHTS AND THE HELSINKI FINAL ACT

While the United States' implementation of these human rights agreements has certainly not been perfect,⁶⁴ Soviet compliance may, by the Western standard used here, be judged as most unimpressive.⁶⁵ The Soviet concept of freedom of speech differs dramatically from the United States' ideal;⁶⁶ over 200 people were arrested in the Soviet

60. *Id.* "Questions Relating to the Security in Europe," part (a), sec. VII (Basket I).

61. *See infra* note 173 and accompanying text.

62. Helsinki Final Act, *supra* note 12, "Questions Relating to the Security in Europe," part (a), sec. VII (Basket I).

63. *Id.* sec. I.

64. President Carter admitted this in a news conference in 1977: "We are a signatory of the Helsinki Agreement. We are ourselves culpable in some ways for not giving people adequate right to move around in our country or restricting, unnecessarily in my opinion, visitation to this country by those who disagree with us politically." Leary, *supra* note 18, at 113. Perhaps one reason why Western human rights violations do not seem to be as extensively documented as Eastern violations is that there are very few Helsinki monitoring groups in the West which concentrate on violations of human rights by their own governments. *Id.* at 127. While the question of Western violations is certainly an interesting one, it is beyond the scope of this Comment.

65. *See* Dep't of State, 97th Cong., 2d Sess., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 1981, 887 (Comm. Print 1982) [hereinafter cited as COUNTRY REPORTS]. It should be noted that all groups which monitor the human rights situation in the Soviet Union have difficulty getting accurate information out of that country. Their findings should therefore be assessed with that fact in mind.

66. *Id.* at 892-93. Under the Soviet Constitution of 1977, Article 50 grants "[f]reedom of speech, press, assembly, meetings, street processions and demonstrations." Article 39, however, states that "'enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of the society or the state;'" this restriction effectively nullifies Article 50. *Id.* at 892.

Union in 1982 "solely for expressing views . . . disapproved of by the authorities."⁶⁷ This is in direct violation of Articles 18 and 19 of both the Universal Declaration and the Political Covenant, as described above, which provide for freedom of expression and belief. Of those persons arrested in 1982, Western sources estimate that more than half were arrested because of their religious views.⁶⁸

One religious group which suffers special persecution in the Soviet Union is the Jews, many of whom seek to emigrate to Israel. Merely applying for emigration can bring on "a variety of administrative and extra-legal sanctions, including loss of employment, harassment, social ostracism, and long delays" for the applicant.⁶⁹ Although Jews are by far the majority group seeking to emigrate, they are not the only such national group: at least nine Soviet Germans and sixteen other nationals were arrested or tried in 1982 in connection with their campaign to emigrate.⁷⁰ This violates the freedom of movement guarantees of the Universal Declaration and the Political Covenant.⁷¹

In addition, in the Soviet Union, the ostensible right of choosing one's place of residence is not completely upheld. Resident permits for those living in some large cities are restricted in number, and "[c]ertain national minorities such as Crimean Tatars, Meshki and Volga Germans are prevented from returning to their traditional homes from which they were deported during World War II."⁷²

Furthermore, these and other minority groups may be prevented from practicing their cultural traditions at all. "The teaching of Jewish cultural traditions is actively discouraged; groups which promote the Ukrainian language are jailed; Lithuanians, Latvians, and Estonians are persecuted for seeking to preserve their national identities; and Muslims in Soviet Central Asia face systematic efforts to eradicate

67. AMNESTY INTERNATIONAL REPORT, *supra* note 1, at 284.

68. *Id.* Most of those arrested were members of Baptist congregations who refuse to register with the authorities because of the restrictions such registration entails. These restrictions include controls on the election of church leaders, on the upbringing of children according to their religious beliefs, and on preaching their religion openly. In addition, those arrested included at least eight members of the Russian Orthodox Church, thirteen Muslims, and eight Jews.

69. COUNTRY REPORTS, *supra* note 65, at 895.

70. AMNESTY INTERNATIONAL REPORT, *supra* note 1, at 285.

71. Universal Declaration, *supra* note 9, art. 13; Political Covenant, *supra* note 11, art. 12.

72. COUNTRY REPORTS, *supra* note 65, at 894.

Islamic traditions and customs.”⁷³ This appears to be in direct violation of the clauses in the Universal Declaration and the Political Covenant which provide for the free enjoyment of one’s cultural heritage.⁷⁴

One of the most unfortunate facets of the Soviet system for the citizen trying to promulgate his religion, national identity, or political views is the ease with which he may be arbitrarily arrested and prosecuted. Provisions for such arrests are within the Soviet criminal code itself,⁷⁵ and provide the basis for the arrest of most political prisoners in the USSR.⁷⁶ Such arbitrary arrest clearly violates the provisions of the Political Covenant, which states that “[n]o one shall be subjected to arbitrary arrest or detention.”⁷⁷

Once the dissident has been arrested, the Soviet Code of Criminal Procedure provides that he may be detained for up to nine months before trial.⁷⁸ Detentions before trial have, on occasion, exceeded one year.⁷⁹ If one assumes that nine months does not constitute “a reasonable time” for pre-trial detention, this violates Article 9 of the Political Covenant.⁸⁰ When a trial finally occurs, its chances of being fair and impartial seem remote: “there is no known instance of an

73. *Id.* at 893.

74. Political Covenant, *supra* note 11, art. 27; Universal Declaration, *supra* note 9, art. 26(2).

75. For example, Article 190-1 of the Soviet Criminal Code provides that “[t]he dissemination of deliberately hostile fabrications slandering the Soviet state and social system” may be punished by up to three years’ imprisonment; Article 190-3 provides that “[t]he organization of, or active participation in, a group actively violating public order” carries a maximum penalty of three years’ imprisonment; Article 70 states that “[a]nti-Soviet agitation and propaganda” is punishable by up to seven years’ imprisonment and an additional five years’ internal exile; “[t]he infringement of the person and the rights of citizens under the appearance of performing religious ceremonies” carries a maximum penalty of five years’ imprisonment under Article 70; and, finally, treason, which includes unlawful attempts to leave the country under Article 64, is punishable by death, although fifteen years’ imprisonment and five years’ internal exile are frequently imposed for such attempts. COUNTRY REPORTS, *supra* note 65, at 890.

Beyond the provisions in the Criminal Code, the KGB seems to have special authority to arrest. As V. Gsousky, a Soviet theorist, has written, “the law gave [the KGB] the . . . power to imprison by an administrative procedure, those . . . whom any court, even the most severe, would . . . acquit.” Grzybowski, *Penal Regimes and Dissenters in the Soviet Orbit*, 43 LAW & CONTEMP. PROBS. 289, 292 (1979). Arbitrary arrest violates the provisions of the Political Covenant, *supra* note 11, art. 9(1).

76. AMNESTY INTERNATIONAL REPORT, *supra* note 1, at 283-84; COUNTRY REPORTS, *supra* note 65, at 890.

77. Political Covenant, *supra* note 11, art. 9(1).

78. COUNTRY REPORTS, *supra* note 65, at 890-91.

79. *Id.* at 891.

80. Political Covenant, *supra* note 11, art. 9(3).

acquittal verdict in a political trial since the Bolshevik Revolution" in 1917.⁸¹ This violates the provisions for fair trial in both the Universal Declaration and the Political Covenant.⁸²

After the inevitable conviction, many political prisoners are sent to labor camps or psychiatric institutions.⁸³ Frequently, labor camps operate under harsh regimes and do not provide prisoners with proper diet or medical care.⁸⁴ In the Soviet penal system, political prisoners qualify to be put in the harshest correctional labor camps along with murderers, armed robbers, those who have committed treason, and repeat offenders of lesser crimes.⁸⁵ The psychiatric institutions are perhaps even worse: "the 'patients' are kept under control by 'therapy' which amounts to little more than torture through the administration of unbalanced doses of powerful and painful drugs such as sulphazin, insulin, sanapax, seduxin and motiden-depo,"⁸⁶ haloperidol, chlorpromazine, trifluoperazine,⁸⁷ aminazine,⁸⁸ and triftazine.⁸⁹ Moreover, the "patients" are subjected to immobilizations and beatings in these institutions.⁹⁰ Such treatments must be considered torture,⁹¹ and violate both the Universal Declaration and the Political Covenant.⁹² In addition, it is possible to consider some of these drug treatments to be scientific experimentation and thus violative of Article 7 of the Political Covenant.⁹³

It should be noted, however, that the psychiatric cases are by their very nature ambiguous, because of the difficulty in identifying

81. COUNTRY REPORTS, *supra* note 65, at 891.

82. Universal Declaration, *supra* note 9, art. 10; Political Covenant, *supra* note 11, art. 14(1).

83. COUNTRY REPORTS, *supra* note 65, at 888-89.

84. *Id.* at 889.

85. Grzybowski, *supra* note 75, at 293.

86. COUNTRY REPORTS, *supra* note 65, at 889.

87. TORTURE IN THE EIGHTIES, Amnesty Int'l Pub. No. ACT/04/01/84 at 221 (1984) [hereinafter cited as TORTURE].

88. Comment, *Soviet Abuse of Psychiatric Commitment: An International Human Rights Issue*, 9 CAL. W. INT'L L.J. 629, 643 (1979).

89. POLITICAL ABUSE OF PSYCHIATRY IN THE USSR, Amnesty Int'l Pub. No. EUR 46/01/83 at 12 (1983) [hereinafter cited as POLITICAL ABUSE].

90. *Id.* at 13.

91. For a description of the effects of some of these drugs, see Comment, *supra* note 88, at 643; and POLITICAL ABUSE, *supra* note 89, at 12. Amnesty International, following U.N. practice, stresses the following definitional elements: severity of physical or mental pain suffered, the deliberateness of the act, the existence of purpose for the act, and the direct or indirect involvement of state officials. TORTURE, *supra* note 87, at 13-14.

92. Universal Declaration, *supra* note 9, art. 5; Political Covenant, *supra* note 11, art. 7.

93. Political Covenant, *supra* note 11, art. 7.

the truly mentally disturbed. After all, both Westerners and Soviets can agree to the proposition that "you have to be crazy to dispute the party line," albeit for different reasons.⁹⁴

Finally, those citizens who openly air complaints about their ill-treatment may find themselves re-arrested or re-confined to psychiatric hospitals.⁹⁵ This violates the right to receive remedy for human rights violations guaranteed by Article 2, Section 3(a), of the Political Covenant.⁹⁶

IV. THE SOVIET VIEW OF THE HUMAN RIGHTS GUARANTEED IN THE INTERNATIONAL AGREEMENTS

After the Political and Social Covenants were adopted in 1966, the Soviet delegate to the United Nations said to the General Assembly: "Our task now is to see to it that these new Covenants are strictly observed everywhere."⁹⁷ Despite extensive documents of Soviet violations, the Soviets have repeatedly claimed that they have accomplished this task in their country.⁹⁸ No doubt many Westerners are confused by this contradiction between Soviet violations, as perceived by the West, and the Soviet posture that no violations occur.

A. *The Soviet Theory of Human Rights*

One explanation for this phenomenon is that "the Marxist school of thought . . . implies a theory of human rights with different characteristics and based on different elements from those accepted in what is generally known as the Western concept."⁹⁹ According to Western conceptions, human rights are rights claimed against the government by the individual. An individual need not have interests which coincide with the interests of society in order to claim these

94. It could be speculated that the apparent use of psychiatric hospitals for the punishment of dissidents reflects a very sophisticated Soviet response to the much more precise formulation of human rights in the 1966 Political and Social Covenants—especially since this type of violation first appeared in the 1970's.

95. TORTURE, *supra* note 87, at 222.

96. Political Covenant, *supra* note 11, art. 2(3)(a) ("any person whose rights or freedoms as herein recognized . . . shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity").

97. Ramcharan, *Implementing the International Covenants on Human Rights*, HUMAN RIGHTS THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 159, 159 (B.G. Ramcharan ed. 1979).

98. Pravda, *supra* note 1.

99. Espiell, *The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches*, HUMAN RIGHTS THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 41, 55 (B.G. Ramcharan ed. 1979).

rights. This Western conception of human rights is the one which predominates in interpretations of international law.¹⁰⁰

The Soviets, however, view human rights as collective rights, opportunities granted to society by its government.¹⁰¹ Under this system, an individual who acts contrary to the interests of the collective is violating the collective's human rights. On the other hand, in the words of Yuriy Andropov when he was head of the KGB, "[a]ny citizen of the Soviet Union whose interests coincide with the interests of society feels the entire scope of our democratic freedoms."¹⁰²

This "collective" view of human rights leads to vastly different definitions of fundamental freedoms than those which the Western view espouses. According to the Soviet view, "freedom of information does not exist in the abstract but in a particular socioeconomic context . . . information should promote the development of socialism and, thus, the eventual good of the people . . . [i]nformation is an aspect of state policy and should be controlled by the state."¹⁰³ According to the Western view, however, freedom of information is a right which should be left almost completely unfettered by the state.¹⁰⁴ This freedom should not be bound by national frontiers, and wide dissemination of news will protect against the impact of propaganda.¹⁰⁵

In addition, "socialist ideology defines liberty as a non-autonomous value, subordinate to the general interest of socialist society in accordance with values determined by the state."¹⁰⁶ In contrast, Western society emphasizes the individual's freedom in his relation with the state.¹⁰⁷

One must consider, finally, the fundamentally hostile attitude of the Soviet Union, as a Marxist-Leninist state, towards religious belief:¹⁰⁸ the Soviet Union is conducting an ongoing ideological struggle against religion.¹⁰⁹ This struggle can be traced back to Karl Marx's

100. *Id.* at 42-44.

101. Dean, *Beyond Helsinki: The Soviet View of Human Rights In International Law*, 21 VA. J. INT'L L. 55, 57, 58 (1981).

102. *Id.* at 63.

103. Leary, *supra* note 18, at 140-41.

104. *Id.* at 140.

105. *Id.*

106. Jonathan & Jacques, *supra* note 52, at 43-44.

107. *Id.* at 43.

108. Leary, *supra* note 18, at 134.

109. "[T]here can be no doubt that, throughout Eastern Europe, the socialist state conducts an ideological struggle against religion. In the pursuit of this struggle, all

belief that religion is "the sigh of the oppressed creature, . . . the opium of the people."¹¹⁰ Contrasted with this is the Western view of general religious tolerance.¹¹¹

Thus, there is a vast ideological gulf which separates the Soviet and Western views of human rights. By relying upon the Marxist view of these rights, the Soviet Union can "redefine" some of the enumerated Western rights in the Covenants and the Helsinki Final Act, and then claim compliance with these newly-defined rights.¹¹²

B. Soviet Use of Escape Clauses

The problem of interpretation is further compounded by the inclusion of the various escape clauses in the Political and Social Covenants, which act as a restriction on the broad rights granted.¹¹³ For instance, Article 19, Paragraph 2, of the Political Covenant states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers. . . ."¹¹⁴

Paragraph 3, however, contains a broad restriction that may be used to severely restrict the right to information:¹¹⁵

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions . . . [which] are necessary:

- (a) For respect of the rights or reputations of others,
- (b) For the protection of national security or of public order
. . . or of public health or morals.¹¹⁶

For example, "[a] state which forbids the sale of foreign newspapers for reasons of national security or public order could argue that it is

the resources of the Communist Party—the guiding party of society—and all the organs of state engaged in the construction of a materialist society are mobilized. We are therefore dealing in essence with an ideological process which, even if there is a growing tendency to adopt compromises in practice, can admit of no ultimate concession.'

Leary, *supra* note 18, at 58 n.159.

110. THE MARX-ENGELS READER 54 (R. Tucker ed. 1978) (emphasis in original).

111. U.S. CONST. amend. I.

112. Leary, *supra* note 18, at 112.

113. See *supra* notes 40-41 and accompanying text.

114. Political Covenant, *supra* note 11, art. 19(2).

115. Frowein, *The Interrelationship between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights*, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 71, 76 (T. Buergenthal ed. 1977).

116. Political Covenant, *supra* note 11, art. 19(3).

acting in accordance with the Covenant, interpreting Paragraph 3 literally."¹¹⁷ The same argument could apply to the official suppression of dissident views.

Article 12 of the Political Covenant, which guarantees the right to travel, freedom of movement, and freedom to leave any country, includes substantially the same escape clause. The result of this inclusion is that "[t]hose socialist states that do not recognise a general right to leave one's country interpret the restrictive clause as giving the state very broad legislative freedom,"¹¹⁸ despite the provision in the Helsinki Final Act which "shows that the participating states regard it as important . . . that no state be permitted to keep its citizens in complete isolation."¹¹⁹

This potential interpretation of escape clauses in the agreements results in the limitation of the human rights accorded. In effect, the Soviet Union imposes its domestic law over the rights guaranteed by treaty so that these rights become merely co-extensive with Soviet law.¹²⁰ Thus, the Soviet Union and her allies "use as general principles the clauses that permit restrictions on the rights guaranteed by the International Covenants . . . in effect, nullifying the grant[s] of the fundamental right[s]. . . ."¹²¹

C. *The Soviet View of National Sovereignty and Self-determination*

Perhaps the reason the Soviet Union places special emphasis on the escape clauses of the agreements is that these clauses, in turn, attach special importance to a nation's sovereign power to regulate for the common good. Such clauses are closer to the Marxist-Leninist interpretation of human rights because they emphasize the value of the collective rather than the value of the individual. The Soviets acknowledge, however, that it is the Western conception of human rights that predominates in international law.¹²² The Soviets argue that the reason for this is that law, like all institutions, is a product of economic relations, and bourgeois capitalism has been dominant in the world system.¹²³ Until such time as socialism can dominate the

117. Frowein, *supra* note 115, at 76.

118. *Id.*

119. *Id.*

120. *Id.* at 74-75.

121. *Id.* at 75.

122. Fryer, *Soviet International Law Today: An Elastic Dogma*, 83 *MIL. L. REV.* 21, 31 (1978).

123. *Id.* at 26-34.

international system, the USSR will always emphasize national sovereignty as a defense against bourgeois concepts of international law,¹²⁴ which emphasize individual, not collective, rights.

To understand the Soviet concept of national sovereignty, it is necessary to explore the closely-linked concept of self-determination. The socialist countries believe that self-determination means that "foreign states shall not interfere in the life of the community against the will of the government."¹²⁵ Thus, "self-determination becomes tantamount to the right to nonintervention."¹²⁶ This should be contrasted with the Western view, which holds that self-determination is the right of the people to choose their form of government.¹²⁷

An examination of the emphasis that the United States and the USSR place on different provisions in the Helsinki Final Act makes these different definitions of self-determination obvious. This Act enumerates ten principles, "all of primary significance," which are to guide relations between participating states.¹²⁸ The eighth principle states:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.¹²⁹

The first provision enumerated in the Helsinki Final Act states:

[t]he 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 juridical equality, to territorial 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.¹³⁰

124. This "defensism," or a "minimum commitment approach to international law," has been a Soviet characteristic since 1917. Fryer, *supra* note 122, at 29-30.

125. Cassese, *The Helsinki Declaration and Self-Determination*, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 83, 86 (T. Buerghenthal ed. 1977) (emphasis in original).

126. *Id.* at 85.

127. *Id.* at 86.

128. Helsinki Final Act, *supra* note 12, "Questions Relating to the Security in Europe," part (a), sec. VII (Basket I).

129. *Id.* sec. VIII.

130. *Id.* sec. I.

Because the Marxist-Leninist countries emphasize the principles of sovereignty and self-determination, "[i]n their view, all other principles are subordinated to and all the parties to the Final Act [are] obligated to maintain a strict respect for the internal rules of society"¹³¹ as set forth in the principles above.

In contrast, the Western states emphasize the concepts enumerated in Principle III,¹³² which deal with human rights and became the basis for Basket III.¹³³ The seventh Principle begins: "[t]he 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."¹³⁴

The inevitable result of the differing emphasis placed upon these principles is obvious. The Soviet Union will deem illegitimate any attempted interference with its government's domestic policy-making and call such interference a violation of Soviet national sovereignty, while the West may consider such attempts quite acceptable.¹³⁵ Indeed, as one commentator points out, "[t]hings have gotten to the point where the very mention of this subject [of human rights] is seen as intervention in the internal affairs of States."¹³⁶

V. THE VIEW OF THE WORLD COURT AND THE SIRACUSA PRINCIPLES

It must be acknowledged that there is merit to the Soviet view of national sovereignty. Each state alone has full knowledge of its domestic situation, and it alone bears responsibility for dealing with that situation.¹³⁷ The state must have some leeway, or "margin of appreci-

131. Jonathan & Jacques, *supra* note 52, at 50. Consider the comment by one Soviet participant at the 1977 Belgrade Follow-up to the Helsinki Conference that one of the most significant results of that Conference was "the failure of the attempts . . . to drive the process started in Helsinki into interference in the internal affairs of sovereign states, which would have been totally opposed to the letter and spirit of Helsinki." YU. KASHLEV, *HELSINKI-BELGRADE: THE SOVIET VIEWPOINT* 81 (1978).

132. Jonathan & Jacques, *supra* note 52, at 50.

133. *Id.*

134. Helsinki Final Act, *supra* note 12, "Questions Relating to the Security in Europe," part (a), sec. VII (Basket I).

135. See YU. KASHLEV, *supra* note 131, at 81.

136. Freymond, *Human Rights and Foreign Policy*, HUMAN RIGHTS THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 67, 72 (B.G. Ramcharan ed. 1979). For the reaction of the Soviets to such "linkage," see Eaton, *Soviet Chills U.S. Idea of Rights Link to Arms*, L.A. Times, Jan. 17, 1985, sec. I, at 7, col. 1.

137. Fawcett, *Human Rights and Domestic Jurisdiction*, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 286, 298 (E. Luard ed. 1967).

ation," to be able to cope effectively with every contingency.¹³⁸ The question, then, is where should the line be drawn? What is the extent of this margin?¹³⁹

Ideally, we should be able to refer this question to an international court or similar adjudicating body which could attempt to reconcile the Soviet and Western views of national sovereignty. The International Court of Justice (I.C.J.) seems a logical contender for this role. Unfortunately, however, the Soviet Union has not accepted compulsory I.C.J. jurisdiction, and the United States has done so only with such restrictive conditions that the question of jurisdiction always remains in United States' hands.¹⁴⁰

Furthermore, the cases which the I.C.J. have considered have done little to clarify the extent of this "margin of appreciation." Only one I.C.J. case, *Barcelona Traction, Light & Power Company, Limited* (Belgium vs. Spain),¹⁴¹ seems to provide any insight into the extent of human rights enforcement in a world of sovereign states. In this case, the court recognized the postwar development of human rights law and noted that such agreements "create obligations erga omnes [toward all persons]."¹⁴² Nevertheless, the court restricted this language in a later paragraph and emphasized "that universal human rights instruments do not empower states parties to protect the victims of human rights violations irrespective of nationality."¹⁴³ The combination of these two references to human rights law leaves, as many commentators have noted, "the impression of a self-contradiction."¹⁴⁴ Essentially, the court acknowledges that these agreements create obligations, but restricts the scope of enforcement of these obligations. The extent of the restriction depends upon the interpretation of the word "protect." If it refers to the use of force on behalf of these victims, such a limitation is hardly innovative.¹⁴⁵ If "protect" refers to the discussion of such violation between two states parties to an agreement, then such a limitation is in contradiction to the enforcement

138. *Id.* at 298.

139. *Id.* at 297-98.

140. S. ROSENNE, *THE WORLD COURT* 73 (1973).

141. *Barcelona Traction, Light & Power Co., Ltd.* (Belg. v. Spain), 1970 I.C.J. 32.

142. Frowein, *supra* note 115, at 71.

143. *Id.*

144. E. HAMBRO & A. ROVINE, *THE CASE LAW OF THE INTERNATIONAL COURT* 225 (1976).

145. For instance, the U.N. Charter prohibits the use of force. U.N. CHARTER, art. 2, sec.

4. See also Helsinki Final Act, *supra* note 12, "Questions Relating to the Security in Europe," part (a), sec. VII (Basket I).

clauses of the Political Covenant.¹⁴⁶

There is, however, a newer source of international authority on the extent to which national sovereignty can limit the obligations to respect the human rights found in agreements. An international symposium held in 1984 focused on the escape clauses in the International Covenant on Civil and Political Rights.¹⁴⁷ This symposium included high governmental officials and distinguished experts in international law from seventeen countries, including representatives from Hungary, Poland, Egypt, India, Turkey, the United Kingdom, and the United States. The fact that such a diverse group reached a consensus lends their findings great weight.

The symposium set forth a number of principles to evaluate a country's claim that a given limitation of a right is justified. One theme that recurs in these principles is that the limitations set forth in the Political Covenant's escape clauses must not render this human rights agreement impotent. The principles of the symposium declare that the burden of proof must lie with the state seeking to justify a limitation, that all limitation clauses must be interpreted "strictly and in favor of the right at issue," and that any limitations must be open to challenge and to effective remedy.¹⁴⁸ In addition, any limitation based upon claims that it is necessary for "national security" or "public safety" must be in response to force, threats of force, or "danger to the safety of persons, to their life or physical integrity, or serious damage to their property."¹⁴⁹

These principles would make it very difficult for the Soviet Union to justify the limitations it places upon the exercise of human rights, especially since the Soviet Union has emphasized the "insignificance" of dissidents and their activities.¹⁵⁰ In addition, a symposium principle that "[a] limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism"¹⁵¹ nullifies the Soviet prohibition of speech considered "anti-Soviet slander or propaganda."¹⁵² Such prominent communist officials as Hanna Bokor-Szego, Head of the International Law Department of the Hungarian Academy of Science, and Andrzej

146. See *infra* notes 160-66 and accompanying text.

147. The Siracusa Principles, reprinted in 7 HUMAN RIGHTS Q. 3-14 (1985).

148. *Id.* at 4-5.

149. *Id.* at 6.

150. See Pravda, *supra* note 1.

151. The Siracusa Principles, *supra* note 147, at 7.

152. See *supra* note 75 for the relevant sections of Soviet Law.

Murzynowski, Director of the Polish Institute of Criminal Law, were among those who signed this statement of principles. The fact that the statement of principles was signed by such a diverse group which includes such high communist officials indicates that the Soviets are abusing the use of "escape clauses" from the point of view of an international consensus. The argument that "domestic jurisdiction" permits restrictions on human rights granted in the Covenants is not to be found in the Siracusa Principles' discussion of justifiable limitations on human rights. Such an analysis lends credence to the Western interpretation of these agreements at the expense of the Soviet interpretation.

VI. TRADITIONAL UNITED STATES POLICY OPTIONS

Most states agree that it is not "impermissible interference for one state to shape its own policies in ways that will influence the behavior of other governments on human rights."¹⁵³ This deliberate structuring is inherent in a state's sovereignty, in its right to "develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations,"¹⁵⁴ and cannot be considered intervention.¹⁵⁵

One non-interventionary action a state may take is simply to criticize the action of another state, either expressly or via symbolic gestures. Putting aside criticisms in international forums, which must be based upon violations of agreements, consider the wealth of criticism aired in domestic forums such as speeches, press releases, and articles.¹⁵⁶ A prominent example of a symbolic gesture is the 1980 Olympic boycott. President Jimmy Carter refused to permit the American team to attend the Olympics in Moscow as long as the Soviets remained in Afghanistan. One intent of such symbolic criticism is to shame and embarrass the criticized country into discontinuing its policy.¹⁵⁷

Another non-interventionary action is economic reprisals such as trade boycotts. Economic reprisals may seek to compel a state to

153. Henkin, *supra* note 8, at 36.

154. Helsinki Final Act, *supra* note 12, "Questions Relating to the Security in Europe," part (a), sec. I (Basket I).

155. Henkin, *supra* note 8, at 36.

156. See J. CARTER, KEEPING FAITH 141-51 (1982).

157. For instance, non-governmental organizations such as Amnesty International or Freedom House have only the weapon of criticism in their arsenal. Obviously, their continued existence shows that they believe it is an effective weapon.

change policy by using the offending state's own economic needs as a weapon. Such sanctions, however, are almost never effective.¹⁵⁸ One example is the 1980 United States grain embargo of the Soviet Union. Because the USSR had invaded Afghanistan, President Carter refused to sell the Soviets grain in 1980. Nevertheless, the Soviets simply responded by purchasing their grain from other sources.¹⁵⁹ As this example demonstrates, even if such sanctions seek to compel, they may not be considered intervention simply because no state can be forced to trade with another nation.

Non-interventionary policy options, when exercised, often appear to be of dubious effect. The enforcement clauses of various international agreements, however, provide another basis and means upon which to attack human rights violations.

The enforcement clauses of the Political Covenant provide that "[i]f a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party."¹⁶⁰ The State Party receiving this communication then has three months to respond with an explanation, a clarification, or a written statement referring to "domestic procedures and remedies taken, pending, or available in the matter."¹⁶¹ If the two States Parties cannot resolve the matter within six months, either state may refer it to the United Nations Human Rights Committee¹⁶² established in the agreement.¹⁶³ The Committee then attempts to use its good offices via negotiations to resolve the issue,¹⁶⁴ and if this effort is unsuccessful, the matter is referred to an ad hoc Conciliation Commission.¹⁶⁵

In reality, however, these "enforcement" clauses do not provide for enforcement at all, but merely set up a framework for discussing

158. Hart, *Three Approaches to the Measurement of Power in International Relations*, 30 INT'L ORGANIZATION 289, 294 (1979). Some argue that the Jackson-Vanik Amendment has been effective. It granted foreign countries most-favored nation status only if they permitted free travel of their citizens to other countries. See Frumkin, *We Can Make the Soviets Comply on Human Rights*, L.A. Times, Mar. 27, 1985, sec. II, at 5, col. 2. Nevertheless, the Jackson-Vanik Amendment is still in force and emigration is extremely low, suggesting that its success was contingent upon detente. See *infra* note 179.

159. J. CARTER, *supra* note 156, at 477-78.

160. Political Covenant, *supra* note 11, art. 41(1)(a).

161. *Id.*

162. *Id.* art. 41(1)(b).

163. *Id.* arts. 28-39.

164. *Id.* art. 41, secs. (1)(c)-(h).

165. *Id.* art. 42.

violations. The most important part of this framework is neither the Human Rights Committee nor the ad hoc Conciliation Commission; rather, it is the legitimation of one state's serving upon another state a written notice of suspected violations of guaranteed human rights. Thus, the state receiving such notice cannot legitimately claim that such allegations are an illegal intervention in its domestic affairs.¹⁶⁶

Unfortunately, the United States has not yet ratified the Political Covenant, ruling out this form of written criticism. Under the Helsinki Final Act, however, the participating states, which include both the United States and the USSR, agree:

to 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 [of human rights], including inter alia the International Covenants on Human Rights, by which they may be bound.¹⁶⁷

Under this clause, if the Soviet Union is in violation of the Political Covenant (or the Universal Declaration or the Social Covenant), it is also in violation of the Helsinki Final Act, to which the United States is a party. This fact is important because, in the absence of Senate ratification of the International Covenants, there is no other legal basis for the United States to discuss the implementation of these covenants.¹⁶⁸ The Helsinki Final Act's implementation clauses provide a framework for such discussions, declaring that the participating states will implement the Act's provisions "unilaterally in all cases which lend themselves to such action; bilaterally, by negotiations with other participating States; [and] multilaterally. . . ."¹⁶⁹ If the Soviet Union fails to implement the agreement unilaterally, then the United States may have a duty to negotiate with the USSR bilaterally or multilaterally for the implementation of the agreement. This negotiation would include the human rights clauses of the Political Covenant, which are implicit in the Helsinki Final Act. Thus, the Helsinki Final Act may give the United States the authority to make human rights a subject of negotiation with the USSR, without illegally intervening in the domestic affairs of another state.

As it stands, however, this right is not reciprocal, because the

166. Henkin, *supra* note 8, at 22.

167. Helsinki Final Act, *supra* note 12, "Questions Relating to the Security in Europe," part (a), sec. VII (Basket I).

168. Buergenthal, *supra* note 55, at 6.

169. Helsinki Final Act, *supra* note 12, Follow-up to the Conference.

United States, which has not ratified the Political Covenant, is not subject to the same criticism from the Soviet Union as the Soviet Union is subject to from the United States. Generally, international agreements involve reciprocal concessions, and this lack of reciprocity may make the United States' claim that it can criticize the USSR a tenuous one. Nevertheless, the fact that the United States made concessions in fields other than human rights provisions may satisfy a standard of reciprocity.¹⁷⁰ If need be, the United States could renounce its boundary concessions made under the Helsinki Final Act in retaliation for continued Soviet violations of the human rights clauses.¹⁷¹

Admittedly, the renunciation of any part of the Helsinki Final Act would be a drastic action which the United States is not likely to take in response to human rights violations. But there is another, more easily used weapon within the Helsinki Final Act, namely, the ability of the United States to strengthen or weaken the process of detente¹⁷² in response to Soviet implementation or lack of implementation of the human rights provisions of the Helsinki Final Act. The Act is explicitly tied to detente. In the Preamble, the participating states declare that they are "[c]onvinced of the need to exert efforts to make detente both a continuing and an increasingly viable and comprehensive process, universal in scope, and that the implementation of the results of the Conference . . . will be a major contribution to this process. . . ."¹⁷³ In addition, the participating states are "[d]etermined . . . to give full effect to the results of the Conference and to assure . . . the benefits deriving from those results and thus to broaden, deepen, and make continuing and lasting the process of detente."¹⁷⁴ Thus, although the Helsinki Final Act is not a binding agreement, any "failure to fulfill [its] moral and political obligations would entail a loss of prestige and credibility, resulting in a deterioration . . . [of the offending state's] political relations and thus in

170. Other authors, using different analyses, have also concluded that the United States has a legal right to these types of intervention. See Buergenthal, *supra* note 55, at 6; Henkin, *supra* note 8, at 22; Frowein, *supra* note 115, at 80; and Scrivner, *supra* note 50, at 147.

171. Salter, *American Lawyers and Russian Dissidents: The Lawyer as Social Engineer*, 12 INT'L LAW. 869, 875 (1978).

172. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 384 (2d ed. 1978) (defines "detente" as "a lessening of tension or hostility, esp. between nations, as through treaties, trade agreements, etc.").

173. Helsinki Final Act, *supra* note 12, Preamble to "Questions Relating to the Security in Europe" (Basket I) (emphasis in original).

174. Helsinki Final Act, *supra* note 12, Preamble.

detente."¹⁷⁵

This argument is predicated upon the basic notions that the Soviet Union desires detente and that it is willing to improve its human rights climate to achieve detente. These assumptions are valid. Detente has long been a major goal of Soviet foreign policy,¹⁷⁶ and statistics indicate that emigration quotas may be raised during periods of detente.¹⁷⁷ For example, in 1979, the emigration of Jews reached an all-time peak of 51,320. This number dropped dramatically when American-Soviet relations soured after the invasion of Afghanistan, and again after Ronald Reagan's ascension to the Presidency.¹⁷⁸ All of this evidence demonstrates that it is possible to use detente as a weapon in pursuit of human rights goals.

VI. CONCLUSION

All of the traditional policies directed at assisting the Soviet dissident have failed to acknowledge the fundamental differences in United States and Soviet interpretations of human rights, national sovereignty, and self-determination. In addition, such policies have failed to consider the general Soviet view of international law. Because of the importance of national sovereignty to the Soviets, the USSR has always insisted that the state, not the individual, is the only proper subject of international law.¹⁷⁹ International human rights agreements impose duties upon states to implement and enforce these rights for their citizens,¹⁸⁰ and the USSR has at least formally introduced these rights into its legal system.¹⁸¹ Such implementation follows, of course, the Soviet interpretation of what these rights really are:¹⁸² an individual's interests must "coincide with the interests of

175. Jonathan & Jacques, *supra* note 52, at 53.

176. The classic example of this is Brezhnev's speech to the 26th Congress of the Communist Party of the Soviet Union. See L. BREZHNEV, *WE ARE OPTIMISTS* (1981). See also M. GOLUBNICHY, *DETENTE: THE ONLY WAY* (1978).

177. J. CARTER, *supra* note 156, at 149.

178. *Id.* Of course, the decline of the emigration figures may not be entirely due to American efforts supported by detente. Yet, as others have argued, "[w]ithout the collaboration of the U.S. government, the congressional branch in particular, it is virtually certain that the Jewish emigration campaign against the Soviet Union would not have succeeded in facilitating the emigration of well over 100,000 Jews." Wirsing, *The United States and International Protection of Minorities*, *THE DYNAMICS OF HUMAN RIGHTS IN U.S. FOREIGN POLICY* 157, 184 (N. Hevener ed. 1981).

179. Dean, *supra* note 101, at 78.

180. *Id.* at 73.

181. *Id.* at 76. For a more detailed discussion, see Leary, *supra* note 18, at 111-60.

182. Dean, *supra* note 101, at 77.

society" to enjoy his rights in full. From a Western standpoint, this standard does not go far enough. The net result of these varying stances is that, when negotiating and signing human rights agreements, the United States and the USSR were " 'either speaking a different language or using the same words to speak of different realities.' " ¹⁸³

The first step, then, must be to recognize these different realities. The United States must realize that the Soviet Union will always place clauses emphasizing national sovereignty higher than clauses calling for the promulgation of individual human rights because the Soviet Union is a Marxist-Leninist state. Although international authority may lean towards the Western view, until a definitive authority such as the I.C.J. directly addresses the topic, the Soviet Union is unlikely to change its position.

Next, it must be recognized that many goals of Western human rights agreements are not compatible with the socialist goals of the Soviet state. As it exists today, the Soviet Union will not encourage freedom of expression, nor will it encourage a wide dissemination of information; these two fundamental Western freedoms are completely in opposition to Soviet goals. There are, however, some human rights that do not directly contradict Soviet policy. One key to future success in negotiating with the Soviet Union regarding the dissidents will be to focus on these rights.

Although the problem of the Soviet stance on non-intervention may continue to plague agreements, by focusing on the human rights that conflict least with Soviet policy the chances of compliance are significantly augmented. For instance, following Helsinki, the Soviets did take some steps apparently designed to aid family reunification, such as lowering visa fees, and making the process of applying to emigrate both easier and less expensive.¹⁸⁴ Such rights as freedom from loss of employment because of beliefs, freedom from arbitrary arrest, freedom from imprisonment without trial, and freedom from torture and experimentation in psychiatric institutions, do not pose the same problems for the Soviet Union as do freedom of information and freedom of expression—they do not threaten the essential monopoly of the Party over the exchange of ideas. The USSR would likely be less opposed to negotiating about and complying with such rights.

It is precisely the lack of freedom of information and of expres-

183. Leary, *supra* note 18, at 141.

184. *Id.* at 132.

sion which makes Soviet dissidents "criminals."¹⁸⁵ To concentrate on other rights would seem to ignore the central problem. It must be pointed out, however, that all of these human rights are interrelated, and are, in fact, meaningless without each other. Freedom of information and expression are not fulfilled unless there is also freedom from arbitrary arrest and imprisonment. Nevertheless, by focusing on a set of special freedoms and attaining compliance, it may be possible to broaden the range of dissident activity without broadening Soviet punishment for this activity.

Therefore, although the dissident may not legally criticize the Soviet state, perhaps such agreements could keep him or her out of a psychiatric institution or a forced-labor camp. Additionally, perhaps such agreements could limit the penalties for freedom of expression to much shorter terms, or prevent retaliation for such expression on family members.

These new international agreements would have to be very specific, and they would have to be reciprocal. They might call for time limits for the implementation of these pledges, with some type of punishment if these time limits are not met. Given the nature of the international system, such punishments would be minor, such as the official acknowledgement of the violation by the adjudicating agency. Nevertheless, this would provide a legitimate, if limited, legal remedy. Another possibility is for the Soviet Union and the United States to agree to submit violation claims to binding arbitration. This is admittedly a naive solution, which would not be very palatable to either the USSR or the United States. "Most governments and their populations continue to deem it improper to guide national conduct by deference to supra-national decision-making in critical areas," and thus states avoid international tribunals.¹⁸⁶ Finally, the agreements could be enforced by massive publicity of violations by an adjudicating commission.¹⁸⁷ This last solution may offer the most hope. "There is no government on earth that is not sensitive about its reputation and good name. As communication between states increases, this sensitivity grows greater."¹⁸⁸ Massive publicity of these violations would "prick" the pride the Soviets have in their legal system, by pointing out inconsistencies between law and reality.¹⁸⁹

185. See *supra* notes 66-68 and accompanying text.

186. R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 333-34 (1970).

187. Comment, *supra* note 88, at 650-51.

188. Fawcett, *supra* note 137, at 322.

189. Salter, *supra* note 171, at 869-70.

Unfortunately, these proposals are all unlikely to be implemented, at least in the near future, for a variety of reasons. First, the Soviet Union would desire a quid pro for any concession on human rights, which the United States is not likely to give, especially since such a major concession as post-war border recognition seems to have been of limited effectiveness. In addition, the collapse of detente in recent years eliminates a major reason for the Soviets to make concessions on human rights in order to improve their relations with the United States. Therefore, it seems unlikely that any new human rights agreements between the Soviet Union and the United States will appear until detente re-emerges.

Furthermore, even when the word "detente" again characterizes the relationship between the United States and the USSR, the United States government will probably not be able to improve the situation alone. "[A] single government, no matter how influential, cannot win a battle which, given the advanced state of degeneration of international relations, will be long and difficult."¹⁹⁰ Where the help will come from, and when it will come, are questions earnestly debated by both the dissidents and their Western supporters.

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190. Freymond, *supra* note 136, at 79.