

## **VII. Report on the Relationship Between the ABA and the Soviet Bar**

### **RECOMMENDATION**

BE IT RESOLVED, that the American Bar Association:

- (1) Supports the steps which have recently been taken by the U.S.S.R. in the area of legal reform and increased democratization of Soviet society under the declared policy of "glasnost" or "openness";
- (2) (A) Welcomes as a major step toward "justice under the Rule of Law" the recent agreement and expression of mutual intent of the Presidents of the American Bar Association ("ABA") and the Association of Soviet Lawyers ("ASL") to urge their associations to begin a program of reciprocal, free and open observations of trials and other judicial proceedings in criminal and civil cases; and  
(B) Urges that for such an observer program to be meaningful and effective, it should place special emphasis on provisions to permit each Association to designate and observe whatever trials and other judicial proceedings it regards as having significant human rights implications;
- (3) Expresses its hope that positive developments in these and related areas bearing upon the rights of Soviet citizens will continue and will provide a solid basis for progress in all areas of United States-Soviet relations;
- (4) Strongly urges the Soviet government to:
  - (A) Repeal Articles 70 (anti-Soviet agitation and propaganda) and 190-1 (anti-Soviet defamation) of the RSFSR Criminal Code and parallel provisions of the criminal codes of other Soviet republics;
  - (B) ensure adequate representation of criminal defendants, by (i) eliminating the "dopusk" system and all other barriers to defendants' free and independent choice of counsel; (ii) permitting access by defense counsel to their clients from the time of arrest; and (iii) broadening the power of defense counsel to determine the witnesses to be called at trial;
  - (C) release all remaining prisoners of conscience;
  - (D) uphold the internationally recognized rights of religious believers to assemble, possess and distribute religious materials and provide religious instruction for their children in accordance with their respective religious convictions;

(E) establish adequate protections against the abuse of psychiatry within, and as a means of circumventing, the criminal justice system;  
 (F) in any binational marriage involving a Soviet spouse, allow such couple to live together in whichever spouse's country they desire;  
 and

(5) Welcomes in principle the legal codification by the Soviet Union of procedures for emigration from the U.S.S.R., but urges, in accordance with the Soviet obligations pursuant to the provisions of the Helsinki Accords, the U.S.S.R. to implement and/or revise this statute in such a manner as to guarantee freedom of emigration on a wider scale (this process including more expansive definition of the term "family" for purposes of family reunification).

(6) Urges that in the near future, the ABA and ASL establish further programs that would permit reciprocal observations by joint ABA/ASL observation teams of detention facilities and particular detainees designated by either Association in prisons, labor camps, special psychiatric hospitals, or exile.

### REPORT

Under Mikhail Gorbachev's well-publicized policy of "glasnost" or "openness," the Soviet Union has initiated a broad range of reforms in its legal system. Mr. Gorbachev has urged "measures to raise the role and prestige of the Soviet Court."<sup>1</sup> The chairman of the U.S.S.R. Supreme Court, Vladimir Terebilov, has publicly acknowledged that thousands of court cases are marred each year by judicial impropriety and has called for improvement in all areas of the judicial system.<sup>2</sup> The Soviet general media and legal literature have recently given extensive coverage to the exposure of endemic legal abuses and also to a discussion of proposed changes in the system.

The need for reforms in the legal system has been noted repeatedly by Soviet officials over the past twenty-five years. Soviet leaders Khrushchev and Brezhnev each in his time criticized legal abuses and urged the upgrading of the courts and the legal profession. Although it remains unclear exactly how far Soviet legal reform will proceed or precisely which legal provisions and practices will be affected, there have been several encouraging steps suggesting that the current reform drive may yield more substantive results than those in the past. As a first stage, several dozen political prisoners have been released. In addition, law enforcement officials have been condemned and punished for abuses. In one instance, the head of the KGB announced the dismissal of a senior KGB officer

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1. *Soviets Move Toward Reform of Legal System*, Washington Post, Feb. 26, 1987 at A29.

2. *Id.*

who had engineered the illegal arrest of a local investigative reporter, and in a front-page letter in the Communist Party newspaper Pravda, the KGB director pledged to take "additional measures to ensure strict observance of the law" by state security forces.<sup>3</sup> In a robbery case, authorities were sharply rebuked for sentencing an innocent man on insufficient evidence.<sup>4</sup>

Several other developments may give cause to encouragement. A Soviet-style Federal Tort Claims Act has been promised, conferring on Soviet citizens a private right of action against government officials for illegal acts.<sup>5</sup> Soviet officials have also announced the comprehensive re-examination of the criminal code and of laws governing religious practices. The suggestion has been made that defense attorneys may soon be allowed access to their clients at an earlier stage in criminal proceedings (*see infra*). It has also been said that the panel of judges in major cases will be expanded from two to four in an attempt to encourage impartiality.<sup>6</sup>

Although these steps have indeed been encouraging, it is necessary to note that glasnost has thus far left the vast majority of problems unsolved. For example, some one hundred and sixty political prisoners have been released to date, a fact which received much positive coverage in the West. Soviet officials, however, had originally announced in December 1986 that the cases of nearly three hundred such prisoners would be re-examined. To further place these releases in context, Western governments and human rights groups estimate that there are up to 10,000 political prisoners presently incarcerated in the U.S.S.R. Therefore, under the declared policy of glasnost, in which all issues are said to be open to discussion, it is appropriate for those in the West interested in the Rule of Law to express their concerns and make their recommendations, with regard to the Soviet legal system and its adherence to international legal norms.

In early February 1987, Soviet officials announced that comprehensive review of the Soviet criminal code was underway. Both Western and Soviet commentators over the years have expressed reservations regarding many aspects of Soviet criminal law and procedure which impinge upon the legal rights of Soviet citizens.<sup>7</sup> While an analysis of each of these concerns would be too lengthy for the present report, a handful of these issues merit particular attention.

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3. *KGB Head Fires Aide, Criticizes Power Abuse*, Washington Post, Jan. 9, 1987 at A1.

4. *Supra* note 1 at A32.

5. *Id.* at A29.

6. *Id.* at A32.

7. For a sampling of Soviet critical comments on the criminal system, *see, e.g.*, Brian Wrobel, *Glasnost' and Soviet Criminal Trials* (All-Party British Parliamentary Human Rights Group) (1987).

## **ABA/ASL Observer Programs**

On June 11, 1987, ABA President Eugene C. Thomas announced that a "verbal expression of mutual intent" and an agreement had been entered into with Association of Soviet Lawyers President Aleksander Sukharev that will lead to open and free observations of trials and other judicial proceedings by American and Soviet lawyers while in each others' nations. Sukharev is also Minister of Justice of the Russian Soviet Federative Socialist Republic.

As noted by President Thomas, this agreement is a "major breakthrough" and a commitment to best efforts to bring their respective Associations and countries behind the program. "This is an example of solid achievement in the advancement of human rights and improvement of justice that the program we are pursuing is designed to accomplish," President Thomas stated. He continued, "in our final conference in Boise, Idaho, we settled upon our commitment as the Presidents of the ABA and ASL and in a detailed discussion we left no ambiguity and concluded with a handshake. Specifically, Mr. Sukharev understands and agrees that I am making this public announcement as evidence of the reliability in our mutual commitment. Now our Associations must act and government cooperation must be arranged, but we are both confident we can accomplish that in the near term," President Thomas stated.

At the conclusion of his Press Release, President Thomas set forth the specifics of this ABA/ASL understanding:

As presidents of our organizations we have culminated extensive discussions with an agreement. Those discussions have addressed the values that may be realized for the benefit of our respective Associations, of our respective nations and, ultimately, of justice under the Rule of Law throughout the world through a program of free and open exchanges and visits of judicial proceedings by lawyers from the USSR and the USA. The exchanges contemplate ASL and ABA lawyers traveling to each others' nations for the purpose of visiting and becoming familiar with civil and criminal judicial proceedings in general, but also in particular, individual cases.

The presidents acknowledge that finalization, documentation of arrangements and implementation of the general program contemplated by this announcement will require cooperation of our respective organizations. Subject thereto, however, and by this announcement, the respective Presidents do herewith articulate their respective intentions for the Associations they represent and do commit themselves to good faith best efforts in the accomplishment and implementation of a lawyers' program of free, open interchange and visitation between Soviet and American judicial systems and proceedings, including organizations of lawyers, judges and relevant government officials in the two nations.

While these exchanges are not to be limited to the trial of criminal and civil cases, it is anticipated that they will be points of emphasis. Also, and though details remain to be addressed, it is contemplated that the visitors will bear their own costs, personally or through sponsoring Associations, while the host

will act to assure convenient access, travel and accommodations and to facilitate such visits to assure full realization of the expectations of this program for the enhancement of understanding and knowledge, and the advancement of justice in our two nations.

Since 1984, The American Bar Association has had positive experiences with several foreign nations through its International Human Rights Trial Observer Project. This project is administered by the ABA's Section of Individual Rights and Responsibilities. It is funded by grants from the Ford Foundation and the J. Roderick MacArthur Foundation. In furtherance of the ABA's Goal VIII regarding the rule of law in the international community, the purpose of this project is to provide an opportunity for the American Bar Association to learn firsthand how various countries conduct trials in cases with significant human rights implications.

The Observers' purpose is not to interfere or participate in the trial in any way, but rather to passively observe the proceedings and report what they observe to the President of the Association. This is an excellent educational program with a proven track record of professionalism. In establishing this program in 1984, the ABA noted that since 1949, several other legal organizations had also sent observers to monitor over 300 trials or appellate proceedings in over 60 countries.

Pursuant to this program, and with the full cooperation of the host government in every case, the ABA has thus far sent a total of six observer missions to Yugoslavia, Liberia and South Africa between 1984 and 1986. These missions have proven the utility of the project's design. For each trial, the host government has cooperatively facilitated the ABA trial observer's attendance. Each ABA observer has submitted a written report to the ABA President at the conclusion of his mission.

In late 1984 and early 1985, the former Counsel to the Watergate Special Prosecutor and Deputy U.S. Solicitor General, Philip Lacovara (who now chairs the advisory board that oversees this program) and two senior partners in the New York and Paris offices of a prominent New York law firm, Stuart Robinowitz and Joseph Iseman, were the ABA observers at different stages of the trial of the "Belgrade Six" in Yugoslavia. The "Belgrade Six" were accused of "hostile propaganda" and conspiracy to overthrow the Yugoslav Government. Our observers were all courteously received by Yugoslav officials and accorded prominent seats in the courtroom. When court was not in session and without interfering with or participating in the proceedings in any way, our observers were granted interviews with key government officials, prosecutors, defendants, and defense counsel in order to gain a better understanding about the circumstances surrounding the trial.

In 1986, the ABA President authorized attorney Fred Gray, the then President of the National Bar Association, to observe a trial of civilians

who were charged with complicity in an attempted coup d'état. In these proceedings, the judge ultimately declared a mistrial when the jury failed to return a unanimous verdict. The defendants were subsequently pardoned by the President of Liberia as part of a general amnesty for political prisoners. As in Yugoslavia and South Africa, the host government facilitated our observer's attendance at the trial. Afterwards, while the Minister of Justice of Liberia was on a trip to Washington, D.C., the President of the ABA paid a courtesy call on him just prior to the issuance of the Presidential pardon for the defendants.

Detailed guidelines previously have been developed for the International Human Rights Trial Observer Project and adopted by the ABA Board of Governors. These guidelines will no doubt provide a good basis for the development of the new ABA/ASL observer agreement.

### **Articles 70 and 190-1**

These two articles have repeatedly resulted in the harassment and prosecution of Soviet citizens who have merely exercised their otherwise legally guaranteed rights to freedom of expression and of information. In many cases, attempts by activists to strengthen the Rule of Law by publicizing violations of human rights are regarded by the government as a political activity aimed at weakening the fabric of Soviet society. These two articles are directly aimed against such activities and have provided the basis for the imprisonment of many of these activists.

Article 70 of the Criminal Code of the Russian Soviet Federated Socialist Republic (RSFSR) and parallel provisions of criminal codes of the other union republics criminalizes "anti-Soviet agitation and propaganda." It makes any activity aimed at subverting or weakening the Soviet state, including preparation, circulation or possession of literature "which defame[s] the Soviet state and social system," punishable by a maximum of ten years imprisonment plus five years of internal exile. In January 1984, the article was amended to broaden the definition of "anti-Soviet literature" to include "materials . . . in written, printed or other form," thus including any object or art form deemed anti-Soviet by the authorities. The 1984 amendment also added the receipt of any funds or other material assistance from abroad to the list of aggravating circumstances which raise the maximum sentence for violations of Article 70. Many of the political prisoners who have been released during 1987 had been sentenced under Article 70, and Soviet officials have acknowledged that the article is now being reconsidered.

Article 190-1 makes criminal the "circulation in an oral form of fabrications . . . which defame the Soviet state and social system" or the preparation or circulation of such comments "in written, printed or any

other form." Its wording has allowed authorities to prosecute anyone making oral or written statements deemed to be libelous. Violations of Article 190-1 are punishable by a maximum sentence of three years imprisonment plus one year of internal exile.

These two articles plainly inhibit the exercise of several basic rights which the Soviet Union has obliged itself to uphold by its accession to various international legal instruments. If the current Soviet effort at legal reform under the rubric of glasnost is to carry with it the increased openness and democratization of Soviet society which has been pledged, repeal of these two articles will be an essential step forward. It will also be necessary to ensure that following such repeal, these articles are not subsequently replaced by other provisions which have a similarly inhibitory effect on freedom of speech and freedom of information.

### Representation of Criminal Defendants

According to Article 14(3) of the International Covenant on Civil and Political Rights, every criminal defendant is "entitled . . . to adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing . . . and to defend himself . . . through legal counsel of his own choosing . . ." Although the U.S.S.R. is a party to the Covenant, the Soviet criminal system does not wholly comply with this commitment.

The right to counsel of one's choosing is formally limited by Soviet law in all criminal cases. The Code of Criminal Procedure of the Russian republic specifically provides that the judge should decide "whether to permit as defense counsel the person selected by the accused or whether to appoint defense counsel."<sup>8</sup> In the event that the defendant's chosen counsel cannot be present for a period of five days, the criminal investigator has the right to "summon other defense counsel."<sup>9</sup> Many cases are tried in so-called "special" courts. These courts have jurisdiction over matters concerning workers at secret enterprises and institutions, and thus effectively have jurisdiction over hundreds of thousands of Soviet citizens. A limited number of defense counsel form a part of the legal staff of these institutions, and regular defense attorneys are not allowed to participate in the cases before these courts.<sup>10</sup>

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8. RSFSR Code of Criminal Procedure [hereinafter cited as CCP], Article 228(3).

9. CCP, Article 201.

10. Yurii Luryi, *The Right to Counsel in Ordinary Criminal Cases in the USSR*, in *SOVIET LAW AFTER STALIN, PART I* (eds. D. B. Barry, F.J.H.M. Feldbrugge, G. Ginsburgs and P. B. Maggs) (1977), at 106.

In addition to these restrictions in non-political trials, an unwritten yet well-enforced system known as "dopusk" or "clearance" is operational in any Soviet political trial. All Soviet defense attorneys are employed by public "colleges of advocates". Under the dopusk system, no defense attorney can be permitted to represent a defendant in a political case unless he receives prior clearance issued by the manager of the law office for which he works. The determination of who has the proper political credentials to receive such clearance among the members of the practicing bar is said to be generally made by the KGB acting behind the scenes.<sup>11</sup> It is estimated that among members of the Moscow City College of Advocates, fewer than ten percent are approved for dopusk. It is further widely asserted that those defense attorneys who argue too forcefully on behalf of dissident clients are removed from the dopusk list. As a consequence, criminal defendants in political trials are frequently denied their right to counsel of choice.

In virtually all criminal cases, the defendant is held in custody and denied any access to counsel until the conclusion of the preliminary investigation. The Code of Criminal Procedure permits this investigation to go on for up to nine months<sup>12</sup> (this time limit has been extended in individual political cases), during which time the defendant has no legal protection and no access to legal advice. At the conclusion of this period, a conclusion to indict will be handed down, at which time the person in custody may communicate with an attorney for the first time. The Code of Criminal Procedure provides that the trial should start within two weeks of this date.<sup>13</sup> In addition to the lack of legal protection during the investigatory period, this system hardly gives an adequate opportunity to counsel to prepare a substantial case for the defense. One of the legal reforms reportedly now under consideration by Soviet authorities is the granting of access of defense attorneys to their clients at an earlier stage in criminal proceedings.

At a pretrial hearing, the court determines the list of witnesses to be called at trial. The basis for this decision is a list of proposed witnesses compiled by the criminal investigator and appended to his conclusion to indict. This list does not need to provide the names of all those who provided information for the investigation, and the judge may decide on the witness list in closed session without the presence of the defense counsel.

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11. Christopher Osakwe, *Due Process of Law and Civil Rights Cases in the Soviet Union*, in *SOVIET LAW AFTER STALIN*, *id.* at 210.

12. CCP, Articles 97 and 133.

13. CCP, Article 239.

## Religious Rights

Soviet restrictions on the freedom of religion guaranteed by *inter alia* Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights are well known. As religious associations may legally operate only if they register with and receive approval from local government authorities, the government effectively has the power to deny legal status to entire religious denominations. This has been the case, for example, with the Ukrainian Catholic Church and with Jehovah's Witnesses. Licensed associations must operate in accordance with the rules, regulations and specific instructions of the Council of Religious Affairs, the body that supervises all authorized religious activities in the U.S.S.R. Clergy cannot legally practice their calling without the Council's approval. Soviet law explicitly prohibits religious associations from

organizing either special children's, youth, women's prayer or other meetings or general bible, literary, handicraft, labor, religious study, or other meetings, groups, circles, sections, and also arranging excursions and children's playgrounds, opening libraries and reading rooms or organizing sanitariums and medical assistance.<sup>14</sup>

Under Soviet law, children may be taught religion only by their parents at home; any other form of religious instruction is forbidden. The RSFSR Code on Marriage and the Family requires parents to raise their children as "worthy members of a socialist society,"<sup>15</sup> and provides for the deprivation of parental rights for those who fail to do so or who have a "harmful influence of the child by their . . . antisocial conduct."<sup>16</sup> Some religious believers have had their children taken from them and others have been threatened with such actions because they were raising their children according to their religious beliefs.

Many religious leaders have been imprisoned under criminal laws such as the following:

The organizing or directing of a group, the activity of which, carried on under the appearance of preaching religious beliefs and performing religious ceremonies, is connected with . . . inducing of citizens to refuse social activity . . . or with drawing of minors into such group, shall be punished by deprivation of freedom for a term not exceeding five years . . .<sup>17</sup>

Those who do not organize but simply participate in the religious group are subject to a maximum three year sentence. Other religious believers

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14. Decree of the All-Russian Central Executive Committee and Council of People's Commissars, April 8, 1919, as amended 1932 and 1975, Article I, 17(c).

15. RSFSR Code on Marriage and the Family, Article 227.

16. *Id.*, Article 59.

17. Criminal Code of the RSFSR, Article 227.

have been sentenced under Articles 70 and 190-1 of the criminal code (discussed supra page 4) for their distribution or possession of religious literature, some are committed to psychiatric institutions for their refusal to abandon their religious beliefs and still others are said to be incarcerated under a variety of fabricated criminal charges. It is estimated that one-third of all Soviet political prisoners are religious believers.<sup>18</sup>

The assurance of the internationally recognized rights of Soviet religious believers requires not simply reform of government practices, but reform of the laws as well. As noted recently by the Chairman of the Council of Religious Affairs, Konstantin Kharchev, it is not always "true that believers in the Soviet Union are treated in a lawless manner. We are acting according to the law. Whether you believe a particular law is good or bad is another question."<sup>19</sup> He also stated, however "democratization in the sphere of government policy toward religion" and announced the reconsideration of "many questions relating to religious legislation."<sup>20</sup>

### Psychiatric Abuse

In the words of one U.S. State Department official, Soviet "psychiatric abuse is a technique that perverts medicine to destroy law."<sup>21</sup> In many cases, labeling a healthy dissident as insane has made it possible to place such individuals in psychiatric institutions for indefinite terms without the formalities of a criminal proceeding. Those actually charged with criminal conduct are tried according to insanity rules outlined in the code of criminal procedure of each union republic of the U.S.S.R., under which the accused loses most procedural rights. If then found to represent a "special danger" to society (an undefined term), dissenters can be sentenced to "special psychiatric hospitals" which are under the jurisdiction of the security forces (MVD) and are largely staffed by MVD officers.<sup>22</sup> Although Western observers have been permitted in the past at ordinary psychiatric hospitals (under the administration of health authorities), these special psychiatric hospitals have remained closed to any outside inspec-

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18. *Religious Persecution in the Soviet Union: Hearing Before the Subcommittees on Europe and the Middle East and on Human Rights and International Organizations, House Committee on Foreign Affairs, 99th Cong., 2d Sess. 10 (1986)* (testimony of Hon. Edward J. Derwinski, Counselor of the Department of State).

19. *Soviet Official: Laws on Religion Are Misapplied*, Washington Jewish Week, Oct. 30, 1986 at 6.

20. *Id.*

21. *Abuse of Psychiatry in the Soviet Union: Joint Hearing Before the Commission on Security and Cooperation in Europe and the Subcommittee on Human Rights and International Organizations, House Committee on Foreign Affairs, 98th Cong., 1st Sess. 4 (1983)* [hereinafter cited as *Psychiatry Hearing*].

22. *Id.* at 65-66.

tion. According to the American Psychiatric Association, many prisoners in these Soviet special psychiatric hospitals are given treatments of neuroleptic drugs in much larger doses than would be given under normal psychiatric hospitalization even to the most severely ill patient. "In many cases, specific drugs are used in these [special psychiatric] hospitals which are no longer used in other countries, or even in the Ordinary Psychiatric Hospitals in the U.S.S.R."<sup>23</sup>

The following acts, among others, have each been designated "socially dangerous" and have been used by Soviet authorities as grounds for such psychiatric commitment: refusing to relinquish one's religious beliefs, writing complaints to government authorities, reading poetry at a meeting honoring a Ukrainian national poet, and having "reformist delusions."<sup>24</sup> The father of an imprisoned draft resister was confined to a psychiatric institution in July 1986 while on his way to demonstrate on behalf of his son, and has reportedly been subjected to a prolonged treatment of drug injections.<sup>25</sup>

Worldwide pressure with regard to psychiatric abuse forced the All-Union Society of Neurologists and Psychiatrists of the U.S.S.R. to resign from the World Psychiatric Association in January 1983 rather than face impending WPA censure. Although the current Soviet review of criminal procedures may provide an opportunity for reform, to date "there seems to have been no systematic change in the practice of placing [healthy] dissenters in mental hospitals in the U.S.S.R.,"<sup>26</sup> with many political and religious activists confined to psychiatric institutions for nothing more than the exercise of their freedoms of conscience, speech and association.

### **Binational Marriages**

In the Helsinki Final Act, the participating states agreed to "examine favorably and on the basis of humanitarian considerations requests for exit or entry permits from persons who have decided to marry a citizen from another participating State."<sup>27</sup> Approximately one hundred marriages occur each year in the Soviet Union between American and Soviet citizens. In most cases, the couple is then permitted to live together in

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23. Statement by the American Psychiatric Association, released at a press conference on the subject of psychiatric abuse in the USSR, Vienna, Austria, March 23, 1987 [hereinafter cited as APA Statement], at 1.

24. *Psychiatric Hearings*, *supra* note 21, at 64-65.

25. Twenty-first Semiannual Report by the President to the Commission on Security and Cooperation in Europe on the Implementation of the Helsinki Final Act, April 1, 1986-October 1, 1986, at 7-8.

26. APA Statement, *supra* note 23, at 2.

27. Final Act of the Conference on Security and Cooperation in Europe, Helsinki, Finland, 1975 ("CSCE"), Basket III, 1(c).

whichever of their respective countries they desire. In a small but tragic number of these cases, however, the Soviet government denies the right of emigration to the Soviet spouse and refuses to allow the American spouse to reenter the U.S.S.R. Some of these spouses have been informed by Soviet officials that their cases cannot be resolved until the international political situation improves.<sup>28</sup> This sort of subjugation of basic individual marriage and family rights to vague state political interests clearly runs counter to Soviet international legal obligations. Although eleven longstanding binational marriage cases were resolved at the time of the 1985 Reagan-Gorbachev Geneva summit meeting, some twenty to thirty American citizens today remain barred from enjoying a normal marriage with their chosen spouses.

### **Statute on Entry Into and Departure From the U.S.S.R.**

Freedom of emigration from the Soviet Union and from other Warsaw Pact countries has, of course, been a contentious issue between East and West for many years. Despite its international legal commitments under *inter alia* Article 12 of the International Covenant on Civil and Political Rights, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Helsinki Final Act, the Soviet government places severe restrictions on the right to emigrate. In practice, only members of three national minorities have been permitted to emigrate in significant numbers: Jews to Israel, ethnic Germans to the Federal Republic of Germany and Armenians to Lebanon and the United States. Members of other nationalities in the U.S.S.R., such as Russians, Ukrainians, Lithuanians, Latvians or Estonians, face almost insurmountable odds against emigration from the Soviet Union.

In response to this situation, the U.S. Congress adopted the Jackson-Vanik amendment to the Trade Act of 1974<sup>29</sup> formally tying trade relations to the issue of freedom of emigration. Under the amendment, nondiscriminatory ("most-favored-nation") tariff treatment may not be extended to any communist country that denies its citizens the right to emigrate, or imposes on them more than nominal fees for exit visas or other documents required for emigration. It also prevents such a country from participating in any program of the U.S. government that extends credits or credit guarantees or investment guarantees, directly or indirectly, i.e. the Export-Import Bank, the Commodity Credit Corporation and the

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28. Statement by U.S. Ambassador Michael Novak in plenary session of the Human Contracts Experts Meeting, Bern, Switzerland, April 22, 1986.

29. 19 U.S.C. § 2432.

Overseas Private Investment Corporation. A key provision allows for presidential waiver of these trade restrictions if the President "has received assurances that the emigrations practices of that country will henceforth lead substantially to the achievement of the objectives" of the Jackson-Vanik amendment.<sup>30</sup> Certain communist countries, including Romania and the People's Republic of China, have been granted such a waiver, and a substantial easing of Soviet emigration restrictions would result in the granting of a waiver and would thus facilitate an improvement in U.S.-Soviet trade relations.

Under the provisions of the Helsinki Final Act, the United States, the Soviet Union and thirty-three other nations obligated themselves to "deal in a positive and humanitarian spirit" with the applications of persons wishing to emigrate to be reunited with family members abroad.<sup>31</sup> Although this provision was intended to expand the opportunities for freedom of emigration, the Soviet government determined that "in the spirit of Helsinki," family reunification was virtually the only legitimate basis for emigration. Beginning in 1980, the Soviets further restricted the emigrant pool by narrowing the definition of "family" to the nuclear family, refusing exit visas to those wishing to join, for example, cousins or grandparents outside of the Soviet Union. As a result of such restrictive policies, emigration from the Soviet Union has, in the mid-1980s, reached the lowest level in more than twenty years.

On January 1, 1987, a new Statute on Entry into the U.S.S.R. and Departure from the U.S.S.R. was put into effect.<sup>32</sup> In enacting this statute, Soviet authorities have responded to one longstanding Western complaint, namely the lack of any written codification of Soviet emigration procedures. The absence of written rules has facilitated arbitrariness and confusion in a system in which harassment of emigration applicants (including dismissal from employment, discrimination in school admission and KGB intimidation) has been the only certain procedural element. In theory, the fact that formal procedures have now been enumerated is therefore a positive step. Detailed codification in any country can serve as a check against abuse and arbitrary application of the law by government officials. The new Soviet statute, however, raises a number of questions as to whether Soviet citizens will adequately be assured their right of emigration as guaranteed by international law.

Among the concerns regarding this statute is the fact that it codifies the restrictive interpretation of "family" by limiting family reunification to

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30. *Id.*

31. Final Act of the CSCE, Basket III, 1(b).

32. USSR Council of Ministers, Decree No. 1064, issued Aug. 28, 1986.

parents, spouses, siblings and children. It also allows any non-emigrating family member—on its face in this instance not limited to immediate relatives—to block the emigrant's departure. Knowledge of state secrets, a rationale which has been abused to deny emigration to many individuals who never had access to security information or whose limited area of knowledge has long since become publicly known and obsolete, is included in the statute as one of several reasons for denying permission to emigrate. In addition, the statute incorporates many vague terms which may permit it to be implemented either very restrictively or very liberally.

On a positive note, emigration has begun to increase in 1987, and senior Soviet officials have indicated that "the term 'family' was not designed to be restrictive in emigration matters."<sup>33</sup> In short, it remains to be seen whether the new statute will in fact reduce arbitrariness and harassment and facilitate emigration for those who desire to leave the U.S.S.R.

### Conclusion

For those interested in the Rule of Law and in the upgrading of the Rule of Law in the Soviet Union, the current review of the Soviet legal system under the rubric of "glasnost" presents an opening for potential progress. There have been many positive signs in the area of legal reform, and these should be forthrightly acknowledged and encouraged. Simultaneously, this period of reform is a crucial time to point out those specific aspects of the Soviet legal system which must be revised in order to ensure the protection of internationally recognized human rights within that system.

It should also be noted that the American Bar Association and the Association of Soviet Lawyers have scheduled a joint symposium on the topic of human rights, to be held in the Soviet Union just a few weeks after the annual meeting of the ABA House of Delegates. The adoption of an association-wide policy on the specific points addressed by the proposed resolution will serve to clarify ABA concerns in this area and will ensure that these key elements are properly addressed on the agenda of that symposium.

Respectfully submitted,

Robert C. Mussehl  
Chairperson Standing Committee on World  
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<sup>33</sup> *Jewish Leader Predicts Soviets Will Let Thousands Emigrate*, Washington Post, March 31, 1987, at A26.

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