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The Right of Soviet Jews to Emigrate

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At the beginning of the sixteenth century, Anti-Jewish policy of the Muscovy Tsardom in Russia was expressed by having Jews burnt at the stake for heresy. In 1976, Aleksandr Lunts, a Soviet Jew, felt compelled to leave the Soviet Union due to the oppressive nature of Anti-Semitism in his homeland. Thus, from Tsarist Russia to the present Communist regime, the plight of the Russian Jew has been marred by institutionalized religious persecution. Fortunately, the technological advances of the twentieth century have created a "shrinking world" in which every nation-state is put under microscopic global inspection. The results of these international microscopic inspections have taken varied routes, such as war, apathy, alienation and interntional accord. International law has been the primary catalyst in the evolution of peaceful results. To analyze the problems of the Soviet Jews it will be necessary to scrutinize the dictates of international law, and more important, in order to aid the Soviet Jews who suffer from persecution, resort must be had to international law and world opinion.

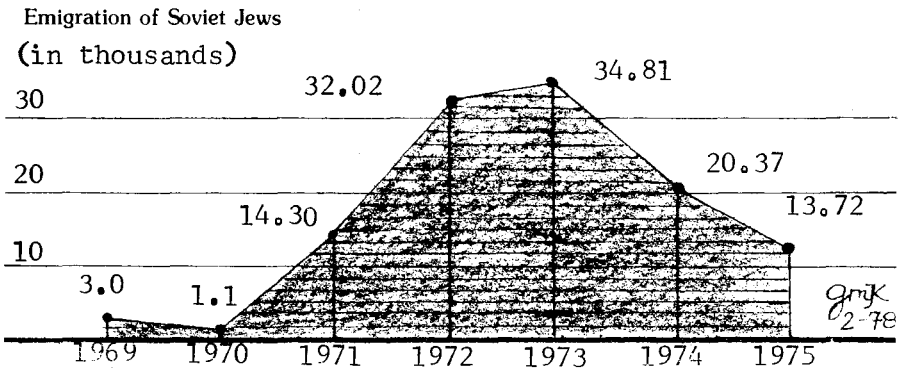
The central thrust of this article will concentrate on the emigration of Jews from the Soviet Union. The total Jewish population of the Soviet Union is approximately 2,000,000 people. As indicated by the chart below, approximately 119,359 Jews have emigrated from the Soviet Union during the years 1969-1975.

The right to emigrate has been proclaimed by international declarations, covenants, conventions and accords. Specifically, Article 13 of the 1948 Universal Declaration of Human Rights, Article 12 of the 1966 International Covenant on Civil and Political Rights, Article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrmination and the Final Act of The Conference on Security and Cooperation in Europe (1975 Helsinki Accord) enshrine the right of emigration within the parameters of international law.

The Constitution of the U.S.S.R. guarantees the same rights found in the international documents, *supra*. Article 124 of the Constitution of the U.S.S.R., states: "In order to guarantee to citizens freedom of conscience, the church in the U.S.S.R. shall be separated from the state, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda shall be recognized for all citizens." In addition, Article 123 of the Constitution of the U.S.S.R. states, "Equality of rights of citizens of the U.S.S.R., regardless of their nationality or race, in all spheres of economic, state, cultural and social-political life shall be an indefeasible law."

International law and the municipal law of the Soviet Union afford Soviet Jews, as well as any other citizen, the right to freely observe their chosen religion. Yet, in application, these laws have taken a Kafkaesque twist, with the Soviet Jew caught in the middle. The Soviet Jew has become the pawn of a super-power and only recently has the "game" been documented by western correspondents. These news articles are now redundant in their narratives of Soviet Jews being jailed, Soviet Jews being sent to mental hospitals, Soviet Jews being denied the sacraments of their religion, Soviet Jews being denied permission to emigrate from the Soviet Union, Soviet Jews being handicapped by quota systems in higher education. The Soviet Union denies all its citizens many basic human rights taken for granted in the West, but the Jews are treated worse than most. Despite its slogans about equality, communism has always been ambivalent on the Semitic question.

Prior to discussing the import of international law on the right to emigrate, it is imperative to review the Soviet perspective on international law. Soviet jurists give narrower scope to the sources and subjects of international law than most Western authorities. Consequently, an examination of the obligations which the Soviets themselves accept is limited by this narrower outlook. Of the two primary sources of international law recognized by the Soviets—international treaties and international customs—the former is considered paramount. The Soviets stress inter-state negotiation leading to positive agreements as the basic source of law governing international relations. Nevertheless, a recent trend in Soviet public international law has been to accept certain decisions and resolutions of international organizations as a source of international law if they receive general international recognition. Whereas the Soviets recognize states, individuals and juridical persons as the subjects of municipal law, they take the position that states are the only subjects of international law.



Soviet spokesmen have repeatedly stated that the individual cannot be a subject of international law. Professor Novchan, a Soviet legal scholar, states that, "The theory that the individual is a subject of international law is incompatible with the nature of international law as interstate law and has very few supporters among international jurists. The exponents of such a cosmopolitan interpretation of human rights in essence completely negate the sovereignty of states and in fact, negate international law by replacing it with 'human right.' "

Soviet Jews requesting permission to emigrate to Israel insist that their claim raises a right of repatriation. They point to the establishment of Israel as a Jewish state and repeatedly refer to it as their country and the homeland of the Jewish people. A prerequisite to an application for an exit visa is an invitation from a relative abroad, and every Soviet Jew who has applied to emigrate to Israel has relatives there. The Soviet Government itself has recognized Israel as the homeland of the Jewish people.

On December 10, 1948, the United Nations General Assembly passed the Universal Declaration of Human Rights (Universal Declaration) as a "common standard of achievement for all peoples and all nations." Article 13(2) of the Universal Declaration states: "Every person has the right to leave any country, including his own, and to return to his country." Although initially not binding under international law, since its adoption the Declaration has received widespread recognition and has taken on increased significance. The General Assembly, in two other resolutions, has declared the Universal Declaration to be binding. The view that the adoption of a resolution of an international organization on a question of abstract legal principles constitutes important evidence of international law has gained increasing support.

U Thant called the Universal Declaration the "Magna Carta of Mankind." It is far more than a mere moral manifesto. The Universal Declaration is, by custom, becoming recognized as an expression of rules binding upon states.

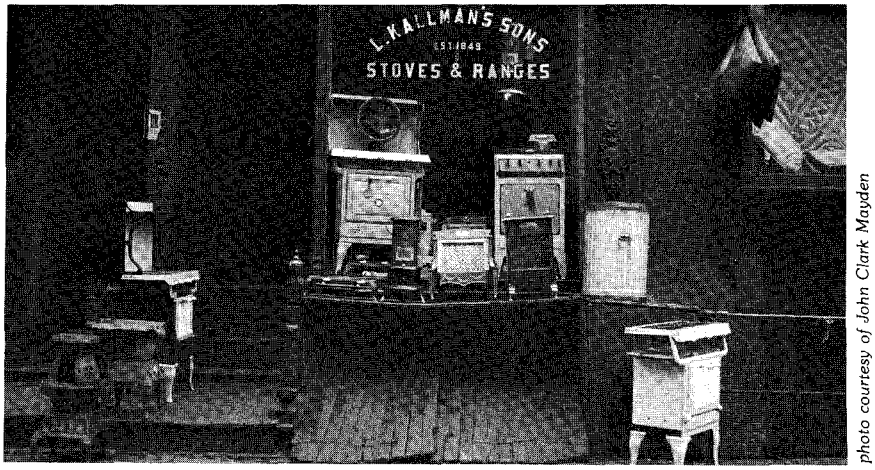


photo courtesy of John Clark Mayden

The International Covenant on Civil and Political Rights, passed unanimously by the General Assembly on December 16, 1966, is a treaty which guarantees the right of emigration. Article 12 of the Covenant states, in part:

> (2) Everyone shall be free to leave any country including his own.
> (3) The above mentioned rights shall not be subject to any restrictions except those which are provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Covenant.
> (4) No one shall be arbitrarily deprived of the right to enter his own country.

The Soviets claim that their legislation and rules of departure are in full accord with the Covenant. When the Soviets have not acted in accordance with the bare requirements of Article 12(2) of the Covenant, they rely on the exceptions contained in Article 12(3) to justify their actions. National security has been the most frequent reason given by the Soviets for denying exit visas. The question of national security is very much apposite to many cases of the so-called Jewish "refuseniks" (term applied to Jews who have been refused an exit visa) in the U.S.S.R., who have been denied the right to emigrate owing to alleged previous access to State secrets. There probably are instances in which the Soviet government is genuinely and legitimately concerned about the possibility of security leaks as a result of emigration. The problems arise, however, from indiscriminate, and at times bizarre, application of this control device. The trouble is that there is no provision in the Soviet internal legal system clarifying the boundaries which encompass national security. If the clause regarding "national security" is not given a narrow interpretation, the effect could be to deny or dilute the right of emigration. To guard against use of these exceptions for arbitrary purposes, the standard suggested by Judge Ingles of the Philippines could be applied. In a thorough study of the right of the individual to leave any country and return to his own, Judge Ingles recommended that the use of the public order and national security exceptions be restricted to instances in which there is a "clear and pressing danger of injury."

The official Soviet policy on this matter is to detain a national who has had access to classified information for a period of one to five years. In practice, however, Soviet Jews have been denied permission to emigrate after such periods have expired. Until reasonable guidelines for the classifying of those subject to a "national security" label are established and followed by the Soviets, the denial of emigration rights to persons classified with this restrictive label is not justifiable.

There is a powerful case to be made out that the Covenant is indicative of rights long since accepted as binding under general international law and that the Covenant binds States directly by virtue of its international legal status. International law thus recognizes, in the formulation of Article 12 of the Covenant, a right

to emigrate. The Soviet Union has at no stage indicated that it does not regard the clause as a correct statement of the requirements of international law or that it does not feel bound by the Covenant (in fact the Soviets ratified the Covenant on October 16, 1973). Indeed, the Soviet argument is that such a right is fully recognized by Soviet law. The argument, then, is not about the validity of this norm of international law, but about its application in fact in the Soviet Union. Since the right is subject to certain reasonable controls of the State, only the criterion of good faith can indicate whether the controls are being applied for their legitimate purposes.

In additcon to the Universal Declaration and the Covenant, there is the International Convention on the Elimination of Racial Discrimination. Article 5(d) (ii) of the Convention states that "the right to leave any country, including one's own, and to return to one's country" is guaranteed. The Soviet Union ratified this Convention and is legally bound by its provisions. Yet despite evidence of Soviet violations of the Convention, there appears to be no effective international remedy available to those individuals affected by the Soviet policy. Although the Convention provides for the establishment of a Committee on the Elimination of Racial Discrimination, its power is persuasive rather than coercive. It is directed to report annually to the General Assembly and make recommendations based on reports received from state parties. Only such parties may bring allegedly infringing actions of other states before the Committee. Communications from individuals may be received only if the party charged has agreed to recognize the competence of the Committee on such matters, but this provision will not take effect until ten states have assented to such jurisdiction. Even though the possibility exists that another state party may raise the issue of Soviet discrimination against Jews, the U.S.S.R. will not recognize the Committee's jurisdiction over complaints originated by individuals. Moreover, the fact that enforcement provisions are limited to recommendations to the General Assembly underscores the purely advisory nature of the Committee's power.

It should be noted that the Universal Declaration and the Covenant are no different from the Convention on the issue of enforcement. The advisory nature of these documents lend to their being classified as "paper tigers". Perhaps the most profound international statement on human rights in the twentieth century is the Helsinki accord. Signed on August 1, 1975 by thirty-five nations, the Accord recognized the fundamental principles, among them Principle VII: "respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief."

The human rights principle, which represented the West's demand in exchange for recognizing post World War II boundaries in Europe, is specified in concrete terms in "Basket III" (the accord is divided into what has become commonly referred to as three "Baskets"—military security, economic cooperation and humanitarian cooperation) of the Accord.

The Helsinki Accord was a coveted Soviet project for some twenty years prior to its conclusion in 1975. The Soviet Union long had sought Western recognition of its postwar position in Eastern Europe through some statement concerning the inviolability of frontiers. It is "Basket III", and in particular the human contacts and information texts, that were of greatest interest to the West and may have the most influence on future events. But the media colored the event as a dangerous concession by the West. The general conclusion was that the President had demeaned himself by recognizing Soviet postwar domination in Eastern Europe without any substantial quid pro quo. George Ball was more vehement, calling it "a defeat for the West."

Although the Helsinki Accord has caused a flurry of criticism, it is only a moral commitment and not legally binding. For this reason, the conference document was cast in the form of a "Final Act" (in international practice a "Final Act" is not normally a legal instrument). The Helsinki Accord, then, is not a legal document and does not purport to state international law. It is viewed, however, as consistent with international law, and, given the level at which it was concluded, many observers think it may become in fact one of the most widely quoted sources of customary international law.

On October 4, 1977 the thirty-five signatories to the Helsinki Accord met in Belgrade, Yugoslavia to review the Accord. The conference was convened to check how the signatory nations have complied with the agreement reached in Helsinki. Before the meeting began, there were fears that it would become a bitter political wrangle between the U.S. and the U.S.S.R. over human rights. Arthur Goldberg, the Chief U.S. delegate, opened his remarks to the conference by reading off a list of human rights violations but named no names or countries. It appears as if both superpowers are attempting to prevent any diplomatic chasms. Although the diplomats at Belgrade are behaving diplomatically, the start of the conference ignited demonstrations and appeals to the West by Soviet Jewish dissidents.

Since the Belgrade Conference is still in session, as this article goes to press, the outcome is unknown. Taking the risk which faces anyone who makes an educated guess, I believe the Belgrade conference may create a few national bruises but lead to no blood letting. The superpowers will vocalize their disappointment at "Basket III" violations, but immediate rectification will not occur. Yet, the document will be a relentless diplomatic problem for the Soviets for many years to come. A ray of hope emanates from the mere fact that the U.S.S.R. even accepted a separate principle on human rights at Helsinki. Thus, the Soviets having acknowledged the desireability of "Basket III" concepts in one of their favorite international documents succeeded in focusing world attention on their observance of the Accord.

All Soviet citizens, not just Jews, suffer from the Soviet Government's policy of militant atheism and its refusal to consider emigration as a right rather than a rare privilege, as well as from other restrictions. But the limitations on Jews have in many important respects been more stringent. This is chiefly because

Jews appear to be suspect in a special way—many have kin abroad in Israel, the United States, and Western Europe, and "Jewishness" in the Soviet Union has come to be regarded by a certain segment of Soviet officialdom as a more alien phenomenon than the fact of association with other major religious or national cultures in the U.S.S.R. The Soviet regime has viewed the relationship between Soviet Jews and world Jewry with an anxiety bordering on political paranoia. A basic assumption is that the Soviets care about responsible public opinion abroad. In this sense the aforementioned international documents lay the cornerstone for world public opinion to build upon.

On June 15, 1970, a group of Soviet Jews were arrested in Leningrad for conspiring to hijack an airplane. Charged with attempted treason, they were condemned to death. The Supreme Court of the R.S.F.S.R. commuted the sentences to fifteen years. These "Leningrad Hijacking Trials" prompted a distinguished group of American attorneys—Alan Dershowitz, George Fletcher, Eugene Gold, Leon Lipson, Melvin Stein, Telford Taylor, and Nicholas Scoppetta—to form the American Legal Defense Project in order to challenge the validity of the Soviet criminal proceedings. These American lawyers filed petitions for the defendants in the "Leningrad Hijacking Trials". The Procurator General of the U.S.S.R. denied the relief requested by the American lawyers. Reflecting on this unique legal experience, Telford Taylor stated, "The reason why the trials were conducted as they were was exemplary. It was State policy to discourage Jewish emigration without appearing to prohibit it. Loss of jobs, apartments, and other privileges or necessities of Soviet life discouraged some, but by no means all, would be emigrants. Use of the criminal law was another and more drastic means to the same end."

The past and recent events surrounding the plight of Jews within the Soviet Union brings us to a frequently asked question. Why doesn't the Soviet Union allow them to emigrate to Israel or elsewhere; why doesn't it encourage Jewish emigration? The answer to this question is complex and involves a myriad of ideological principles which affect the socio-political fabric of the Soviet Union.

For fundamental ideological reasons, the Soviet Union is closed and forbids emigration. The underlying premise is that the Soviet Union, which was the first to achieve communism, is the most advanced country in the history of man—and all its peoples are content. Is it conceivable, therefore, that large numbers of citizens within such an ideal society should be unsatisfied with their lives and ungrateful for their destiny? Why, then, should anyone wish to emigrate?

But besides the ideological reason is a practical one as well. Despite their lack of sympathy for the Jews as a national group, the Soviet authorities are aware that the Jews are an important component of the Soviet economy. Jews serve as engineers, doctors, teachers, scientists, and artists. Take the Jews out of the Soviet mainstream and economic repercussions will be felt.

Another rationale for the Soviet Union's reluctance to allow mass emigration for its Jewish population is imbedded in the diplomacy of detente. Detente, by its very nature, calls for nation-states to partake in an international give and take. Any state involved in detente must be resigned to the fact that certain concessions must be made in order to gain their own goals. The Soviet Jews have been entangled within this international juggling act. Soviet Jews serve as an integral bargaining element for the Soviet Union when they sit down with their Western counterparts. The emigration figures for Soviet Jews reflect the periods of relaxed East-West relations as well as the periods of polarized relations. Thus, the West must take steps, such as economic retaliation, to afford themselves parity with the Soviets on this issue. But the fact remains that detente is a delicate process in which gradual reform, rather than instant results, is the order of the day.

Neither detente, international law, world public opinion, nor rataliation have proven to be a "wonder drug" for the Soviet Jews attempting to emigrate. Yet, they all serve a useful purpose in the process of eroding the Soviet policy which has been predominant for decades. They also serve the purpose of reaching a solution by peace. The chill from the Cold War period still lingers in East-West relations, and influences the delicate decisions presently made by the Superpowers. Therefore, only national and well thought out plans should be utilized in aiding the Jews in the Soviet Union. This is not to imply that the voice of the world should be toned down, nor that the West should not be relentless in bringing the Soviets to the bargaining table. The major import of this caveat is to highlight the razor's edge which exists between peaceful co-existence and polarity in East-West relations.