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Article abstract

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The Right to Leave and to Family Reunification

Irwin COTLER*

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Introduction

The struggle for humans rights and human dignity has been a struggle, but I would say the struggle was for ourselves, because in what we say, or more importantly in what we do. Particularly in as profound an area as that of international mobility rights, we make a statement about ourselves as a people.

In that context, I would like to organize my remarks around two basic themes. First, the right to emigrate in international law, with particular reference not only to the nature and scope of that right, but the adverse consequences that may flow to those who seek to exercise this right and including as well some references to what Canada as a country or Canadians as a people may be able to do about it. I will include an analysis of the Soviet Union's treatment of the issue of the right to emigrate as a case-study, because there was a particular Canada-Soviet connection in this regard to which will refer.

Secondly, I propose to draw upon, where appropriate, of my own experiences in counselling prospective emigrants, sometimes otherwise called refunic, who have been denied the right to emigrate. In this area where international law is breached more than observed, there are also the daily indignities resulting from a denial of the right to emigrate which go largely unexposed, let alone acted upon. In a word, what we are talking about is the dignity of the human spirit involved as it is so much both in the issue of the right to emigrate, and what will be my second theme, the nexus between international and domestic refugee law, as a part of the larger relationship between international law and domestic law generally. I will particular reference to recommendations for a refugee status determination procedure in Canada, as part of a larger human rights domestic and foreign policy for Canada.

1. Mobility Right in International Law and the Denial of the Right to Emigrate: A Case Study

1.1. Mobility Rights in International Law

The right to emigrate — often referred to as a basic right of personal liberty or a right of personal self-determination upon which all other rights may depend, be it the right of family reunification be it rights to freedom of expression, has found appropriate entrenchment in international treaty law and has been spoken of as well as being part of the *lex lata* or part of international customary law. And so one can find it enshrined in article 13 of the *Universal Declaration of Human Rights*: "Everyone has the right to leave any country, including his own"...; or in article 12 of the *International Covenant on International Civil and Political Rights*: "Everyone shall be free to leave any country including his own". As well, it has found expression, without making specific reference to it in a series of international and regional conventions on human rights.

Finally, the *Helsinki Final Act*, in addition to its own undertakings with respect to freedom of movement contains specific reference committing the participating States, for example Canada and the Soviet Union, as co-signatories, to perform their obligations under both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, which are both mentioned expressively in the Helsinki Final Act incorporated by reference of therein. Moreover, in two follow-up conferences under the *Helsinki Final Act*, last year at this time in Ottawa in the Conference of experts on human rights, and more recently in Berne Switzerland in the Conference of human contacts, the right to leave and the right to family reunification, a related right, were really the organizing idioms of discussion in those conferences. This notion of the right to leave and family reunification is perceived somewhat as an expression of Western polemics and certainly its enshrinement in international law ought to do away with our allegation.

But may I make reference to the remarks of General Secretary Michael Gorbachev at a party congress, and indeed on the eve of the Conference on human contacts in Berne, where he said that the question of human contacts generally, and the family reunification in particular, are central — and I quote his own words — "to a system of international security". That is to say that these issues — and it has been part of the theme of our panel here and of this whole conference — are really bound up with the whole question of international peace and security.

And so, having regard therefore to the manifest expression of the right to emigrate in international law and the manifest importance of this right as a right to personal liberty, I have decided to focus at this point on the Soviet Union's treatment of the issue of the right to emigrate and reunification of family as a case-study, because there are other countries involved in this, in the question of denial of these rights. And so I hope my remark will not be interpreted as anti-soviet but used as a metaphor for this subject matter today.

1.2. The Denial of the Rifht to Emigrate and to Family Reunification: Ida Nudel as a Case of Study

I have chosen this particular case-study for several reasons. First, it is to the credit of the Soviet Union, and this is a matter which is not generally well known, that it has not only been a party to international conventions respecting the right to emigrate, but who, alone amongst all the signatories to the *Helsinki Final Act*, has incorporated the Ten Principles of the *Helsinki Final Act* as part of its own domestic law. In effect, thereby, the right to emigrate has been given the status of a domestic constitutional norm by its own acknowledgement.

Secondly, it is also a little known fact, and I suggest you an important one, that it was Canada who was principally responsible for including in the *Helsinki Final Act* those principles relating to freedom of emigration, reunification of families and freedom of ideas. In effect, we said to the Nudels or others in the Soviet Union: yes, you have a right to emigrate: yes, you can seek to be reunited with your family: and we, Canada, as a cosignatory to the *Helsinki Final Act*, will protect you in the exercise of those rights.

Thirdly and again perhaps little known but of importance in my view, is the fact the experts' meeting on human rights as a follow-up to the *Helsinki Final Act* which took place in May and June in Ottawa last year, characterized the right to leave and, indeed, criticized countries violating their right to leave as part of a larger objective of securing respect for human rights and fundamental freedom as a whole, and stated clearly that respect for these rights should not and cannot be seen as an unwarranted intrusion in the internal affairs of a signatory State. It is in that context that I now refer to a criticism of the Soviet Union's denial of the right to emigrate and to be reunited with one's family, not in any way as an anti-soviet expression, but more, as I say, as a case-study of both the denial of the rights and the adverse consequences that flow from those rights and, finally, what Canada can do about it.

Very quickly, I will touch on the terms of denial of the right to leave and the family reunification itself. As I have indicated, these rights have both been enshrined in international law and regarded as part of customary international law. However, I am not unmindful of the fact that international law does permit certain limitations on these rights in the interest, for example, of national security, "ordre public" and the like. But these limitations as general principles of interpretation of the international law and the law of treaties are exceptions and must be narrowly defined and limited. They must not derogate from the general principles that are sought to be respected and enshrined. And the denial, therefore, in the Soviet Union, to the Soviet Jews or Volga Germans or Soviet Armenians, of the right to emigrate does not fit into any of the limitations that might otherwise be permissible, even within the limit of the framework of limitations under international law.

A case-study of this, and I have otherwise made a document to that effect available, by way of a quick summary, would be the case of Ida Nudel. (See Appendix) Nudel first sought the right to emigrate and be reunited with her family in 1971. She and her sister, who now resides in Israel, are the sole surviving relatives of a family that was otherwise wiped out in a holocaust. Her request to emigrate was refused in 1971. She spent the next seven years struggling against this refusal, with the consequences as well of having lost her job and being subjected to a pattern of surveillance, harassment and the like. In 1978, she put a banner on her balcony saying simply "KGB, give me my visa". Shortly thereafter, she was charged and convicted of malicious hooliganism. In June 1978, she was sentenced to four years in internal exile. Upon completing her sentence in internal exile in 1982, she once again sought the right to emigrate and still to be reunited with her sister. That right remains repeatedly denied, as well as she has not been permitted to return to her former residence in Moscow and thereby to live, from the point of view of human contacts, among whatever support system she may have with respect to any co-religionists, friends, colleagues and the like. And so, fifteen years later, we are still speaking of a person seeking the right to emigrate and be reunited with her family.

I mention this case because I think that sometimes, we lose sight of the daily and personal indignities that result from the violations of these rights. And I have mentioned her case only as a case-study of the denial of this right in the Soviet Union and, indeed, as a case-study of a denial of these rights and similar indignities that may take place in other countries.

And one should make reference here in particular to the issue of reunification of families. The Human Contacts Section of Basket III of the *Helsinki Final Act*, commits the signatories: "To deal in a positive and humanitarian spirit with the application of persons who wish to be united

with the members of their family", and it speaks in particular of those cases where illness and old age might be involved, which is, for example, the case of Ida Nudel.

It should be noted that the Helsinki commitment of reunification of families is neither a substitution for nor a reduction of, the obligation to respect the right to leave under the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Rather, it is a special and indeed additional commitment to provide, within the general framework of the right to leave, particular and favourable treatment to special cases involving reunification of families generally and where, in particular, it includes matter of illness and old age.

Yet, the Soviet Union has taken this fundamental humanitarian principle of reunification of families to which, in Gorbachev's own words, it otherwise subscribes, and has somewhat turned international law and the principle on its head. Rather than deal with the matter of reunification of families in a positive and humanitarian spirit, it has in fact, converted this norm into an impediment, by requiring it as a condition of exercising the right to leave and be reunited with one's family along with a number of other requirements.

The number one: that an applicant for an exit visa have a first degree relative abroad: that there be an invitation of visit, as it is called, from the first degree relative abroad: that on applicant for emigration not leave any family behind, thus turning the close kinship principle of permitting people to leave and be reunited with their family into a principle of having to remain if they have any other family in the Soviet Union, even if that other family does not object or that other family is not even well known to the applicant to begin with.

I might add that, with regard to this matter of reunification of family, I have otherwise criticized Canada's recent decision to levy a $ 125 fee for seeking to exercise this right of reunification of families, and so I want to make it clear that I am speaking about this as a critic, generally speaking.

But most important, and with this I conclude this issue on reunification of families and the right to emigrate, and the adverse consequences that flow from seeking to exercise this right. It is a core principle of the *Helsinki Final Act* found in Principle VII, that signatory countries must respect "the right to know and act upon one's rights". These clearly include the right to leave and be reunited with one's families. The Ottawa Human Rights Meeting, last May-June, even pledged to remove obstacles both to the exercise of these rights and to the right to know and to act upon one's rights generally. It is not only the obstacles placed in the way of the exercise of the right to leave and to

be reunited with one's family, general rights recognized under international law, but even the very attempt to know and act upon one's rights as set forth in the *Helsinki Final Act*, the very attempt to exercise these rights to emigrate which has subjected those applicants to a series of harassments and reprisals. This has resulted not only in the denial of the right to leave and be reunited with one's family, which would be bad enough, but to the loss of a whole network of rights, even though the *Helsinki Final Act* otherwise purports to protect applicants in the exercise of those rights. I am refering here to punitive reprisals such as the loss of a job, the impossibility of finding work, developing impoverishment and a threat of a prosecution for parasitism. Let me give you one of many examples in that regard : ... fired from his job for seeking the right to emigrate he was then charged for parasitism for not having a job : and then threatened with confinement to a psychiatric institution for the treatment of the alleged condition of parasitism. More over, the denial of the international mobility right in the matter of the right to leave and be reunited with one's family is further compounded by the denial of what I would refer to as accessory mobility right, such as the denial of visas for travel, tourism or even medical assistance, or simply visits to one's co-religionist or to one's family, or the reverse, the denial of visits from one's co-religionist or the members of one's family, or even the denial of the right to live within the country at the residence of one's own choice or to move freely within the country, of which Ida Nudel's case is an example as she was kept in internal exile after the four months sentence and not being permitted to return to former residence in Moscow. But again, I would not wish to single out the Soviet Union, and let me just say, for ideological equilibrium as on this latter matter of denial of freedom to both, to live within the country or to move freely within the country, South Africa would be a prime example of the denial of those rights, let alone the denial of all other rights which that country would be otherwise complicit in and of which I have spoken elsewhere.

2. The Nexus Between Domestic and International Refugee Laws : What Can Canada Do ?

2.1. The Nexus Between Domestic and International Refugee Law.

As I have indicated in my view, there is a clear Canadian connection or nexus to this issue of the right to emigrate because, to our credit, we are not only a co-signatory of international treaties enshrining this right, but we have been specifically the ones who have made possible the inclusion of these rights in agreements such as the *Helsinki Final Act*. In my view, to make it clear, both as a matter of international law and as a matter of the integrity of our

bilateral relationships with those countries who deny these rights, that the denials of those rights will adversely effect, for example in that regard, a Canada-USSR relation. For the violations of these undertakings are not only violations of the international law generally, are not only violations of undertakings that these countries, like the Soviet Union, have made with regard to their own citizens, but, in fact, a violation of undertakings that these countries have made to us as co-signatories of those treaties, and which gives us both not only a standing but, in my view, a responsibility to raise those issues of denial of the right to emigrate, and with particular regard to the matter of the right to leave and the reunification of families, as it engages not only directly Canada but Canadian citizens, many of whom have a family in the Soviet Union.

And I have been led to understand that the Soviet Union might otherwise be prepared to enter into an annual bilateral round table on human rights with Canada. So, apart from the general discussions which we have within the international arena pursuant to the United Nations on pursuant to the *Helsinki Final Act*, I would suggest that there be a particular and specific Canada-USSR annual bilateral round table on human rights, where issues of mutual aggrievance and complaint can be raised and hopefully resolved.

Which brings me now to my second area and I will try to be brief in that regard, and that is the issue of refugee law and the nexus between refugee law in a domestic and international context, particularly as regards to Canada.

2.2. What Can Canada Do?

The Minister, Flora MacDonald, mentioned that on May 21st, the Minister of State for Immigration, Walter McLean, announced a new refugee determination policy in the House of Commons. His opening words reflected the compassion if not humanity that one might expect from a person who was a clergy man who spent many years in Nigeria, in the days before the Biafra War. And these were his words in the House of Commons : there is agreement that claims to refugee status should be treated fairly, humanly and expeditiously, words that were echoed by Flora MacDonald today. He went on to say that the Canadian Governement had given careful considerations to the views of refugee groups, church groups and ethnic organizations across the country who were now invaluable in intergrating refugees into Canadian society and has taken those views into account.

Yet, two days later, on May 21st these very groups, through the Refugee Organisations Joined Standing Conference, met Mr. McLean and bitterly attacked the proposals, denouncing them as representing the very opposite of human policies and referring in a word to the Canadian Government refugee

determination policy as being "a betrayal". Now, how then does one account for this disagreement between what the Minister says and indeed what Flora MacDonald stated today, which purported to be relying upon the views of those involved in the Standing Conference on refugees in Canada, and the very reaction of those in those groups themselves referring to it and characterizing it as a betrayal.

Now to understand the basis of this disagreement, we will have to really look at the whole question of refugees in Canada, the present ... unworkable system and the solutions that have been proposed. Time does not permit that, so let me just close with what I think are some of the problems and the basis of disagreement, and close just with some very specific recommendations.

I was pleased to hear a reference from the Minister to the fact that the refugee determination policy will be organized and given expression to the principles of independence in terms of refugee status; the determination procedure will be independent of the immigration process; the question of access, that there will be an universal access for every person in Canada who wishes to claim that he or she is a convention refugee, and that there will be a non-adversarial hearing for the determination of these claims as mandated by the Supreme Court in the Singh case. Unadmittedly, there seems to be at times a "dialogue de sourds", a dialogue of the deaf, because those very principles are some of the principles that have been complained of by those of the Standing Committee with regard to the issues that divide them.

But let me say that I do think, in addition to those principles, which are admittedly the core of a refugee policy that there are other matters which do bear mention here, if not a criticism. I would like to mention it by way of recommendation and with this I close. It should be noted — it was mentioned in earlier thoughts today, and I will not repeat it — that the criteria for respecting refugee status are narrowly prescribed. And in an analysis of the jurisprudence in refugee law and in the determination of refugee status, it would also show that they may be narrowly construed. Yet, as the Supreme Court cautioned in the Singh case, which should not be ignored, that a mistaken judgment in the determination of refugee status may cost a person not only his on her liberty, but may, in fact, cost his or her life. Accordingly, may I make the following suggestion by way of conclusion and by way of elaboration upon the principles that Flora MacDonald mentioned and that I incorporate by reference.

Number one: a refugee claimant should have the right to the council as soon as the claim is made: that he or she should be notified of this right and this right should be made a matter of law, not just a matter of policy; this would, in my view, not only facilitate a just determination of refugee status,

but it might help prevent the improper detention or improper treatment in detention which sometimes occurs pending the first inquiry.

Secondly, that there be an appeal process with a rehearing *de novo* by a hearing panel before the appeal process to the Federal Court of Appeal. In other words, I am suggesting here an intermediate, rehearing on the merits before one goes into what really is ultimately a technical hearing before the Federal Court of Appeal in matters of errors of law and jurisdiction and in matters of refugee law, which in my view does not properly and cannot really properly appraise the issue on the merits involving the important factor of determination, credibility and the like that can only be done in a *de novo* rehearing.

Third, that in cases where the strict definition of a convention refugee cannot not be met and this will happen for example where persons have not fled areas of civil strife or general persecution, but where the need for international protection is no less clear and no less compelling, protection should be made available on humanitarian and compassionate grounds. The provision has been set forth in the policy, but I would like to suggest some specific refinements may say so, to ensure that that policy on humanitarian and compassionate grounds will find appropriate expression.

Finally, although the present policy is one not involving the prosecution of refugees for any breaches of immigration offences, in my view that policy should also be enshrined as a matter of law in order to foreclose any possibilities in this regard. And may I refer to some work that Quebec and in part the federal government have done. Quebec has done particularly in Africa. In my view, refugee policy should not just be only a matter of intake or reaction. It should also be a matter of outreach or what might be called being "pre-active or pro-active". In other words we should be going into the refugee camps and helping to alleviate the human suffering rather than only await and make determinations that is, await the determination of those refugee claims when people are found here in Canada. As I said Canada and Quebec, to its credit, have gone into the refugee's camps, but in my view, the criteria with which selection — I do not like to use that term — recruitment has been made sometimes has been too limited, because the reference has been at times based on the manner in which such refugees may adapt to Canada, so we have adaptive criteria where more emphasis should perhaps be placed on humanitarian considerations in that regard.

With regard to the backlog, the process that the Minister Flora MacDonald has suggested, while I do not, in anyway, impugn again the considerations that underlie it, in my view it might end up being unduly long or cumbersome. We might give some suggestions to a process of landing

people from countries to whom we would not return these people, even if they would not satisfy the criteria for a convention refugee, because these countries otherwise engage in human rights violations.

Conclusion

Canada, as a nation of immigrants, indeed as a nation of refugees also, takes the lead, in part because it has incorporated international refugee laws as part of its domestic law, in part because of initiatives of the Federal Government and the Government of Quebec that allows to say that petitioners come with clean hands in this regard. Canada has taken the initiative to convene a world conference in a matter of refugees, in order to alleviate this human suffering of who has been referred to as the unwanted of the twentieth century.

In a word a refugee policy cannot not be divorced from the human rights domestic and foreign policy to which it belongs. And in matters such as these, and in times such as these, *qui s'excuse s'accuse*. Who ever remains indifferent indicts himself or herself.

Appendix. A Document: The Appeal of Ida Nudel

I. Denial of the Right of Emigrate

The right to emigrate — often referred to as a "basic right of personal liberty" — forms an integral part of the *lex lata* of customary international law. It is now one of the fundamental human rights recognized by international and Soviet law. The right is enshrined in Article 13 of the *Universal Declaration of Human Rights*; Article 12 of the 1966 *International Covenant on Civil and Political Rights*; Article 5(d) of the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 2 of the 1963 Protocol No. 4 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 22 of the 1969 *American Convention on Human Rights*; and the Final Act of the Helsinki Accords, which, in addition to the undertakings regarding freedom of movement and the reunification of families, contains a commitment, in Principle VII of the Final Act to

> act in conformity with the ... Universal Declaration of Human Rights.

which stipulates in Article 13/2:

> Everyone has the right to leave any country, including his own, and to return to his country.

Principle VII further commits the participating States to

> fulfill their obligations as set forth in ... the International Covenants of Human Rights,

one of which, the *Covenant on Civil and Political Rights*, provides:

> Everyone shall be free to leave any country, including his own. (Article 12/2)

The Soviet Union is a Party to the Racial Discrimination Convention; it is a Party to the Covenant on Civil and Political Rights; it approved the adoption of Article 13(2) of the *United Nations Declaration of Human Rights* in the Third Committee of the General Assembly in the autumn of 1984, and has otherwise relied on the United Nations Declaration as a source of international law: (Res. 2442 21 U.N. GAOR Supp. 16, at 46, U.N. Doc. A/6316 (1966); G.A. Res. 2442, 23 U.N. GAOR Supp. 18, at 49, U.N. Doc. A/7218 (1968); G.A. 2443, 23 U.N. GAOR Supp. 18, at 50, U.N. Doc. A/7218 (1968); and it is a Party to the Helsinki Accords. Indeed, President Brezhnev has prided himself on the fact that the U.S.S.R. "is the only country in the world which, in its Constitution, has inscribed the Ten Principles of the Final Act of the Helsinki Conference to the incorporation of these Principles into Article 29 of the Soviet Constitution.

The Helsinki Accords, therefore, appear to have assumed the status of a *Soviet* constitutional document; while one of those Principles set forth in Article 29 "domesticates" international law into the corpus of Soviet constitutional law as follows:

> The U.S.S.R.'s relations with other states are based on the observance of the following principles: ... fulfilment in good faith of obligations arising from the generally recognized principles and rules of international law, and from the international treaties signed by the U.S.S.R.;

the whole confirmed in a recent statement by Soviet authorities that

> Soviet legislation and the rules governing departure from the country are fully in accord with the International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966. The restrictions which we sometimes impose proceed directly from the clauses of the Covenant. (Novosti interview with Boris Shumilin, Deputy Minister of Internal Affairs of the U.S.S.R., *Soviet News*, 27 January 1976)

while the *only* Soviet legislation on this matter, the Regulation on Entry into the U.S.S.R. and Exit from the U.S.S.R. approved by the U.S.S.R. Council of Ministers of September 22, 1970, effective January 1, 1971, and superceding its name sake of June 19, 1959, contains *nothing* that would contradict or detract from the obligations in the covenant, let alone international human rights law generally (*Sobranie post-anovlenii pravitelstva SSSR*, 1970, no. 18, At. 139 (hereafter abbr. *SP SSSR*).

It is true that, inasmuch as the freedom to emigrate is now a part of *customary* international law, it may be argued that the U.S.S.R., as a member of the international community, would be bound to respect this right, even if it were *not* a signatory to a single treaty endorsing freedom of emigration ; as it stands however, the Soviet Union not only *acknowledges* the existence of this fundamental human right, but it *recognizes* its obligations in this regard, as most recently reaffirmed by the incorporation of this right into the Final Act of the Helsinki Accords, and the incorporation of international human rights law into the Soviet Constitution.

Yet these Soviet undertakings, of both a constitutional and international law character have been continuously breached in the rather arbitrary and capricious denial of Ida Nudel's application to emigrate, as set forth in the following particulars.

1. *The Length of the Denial*

Ida Nudel's applications to emigrate have been repeatedly denied for the last 15 years since her first application to leave was refused in 1971. Indeed, she first applied to emigrate to Israel in 1971 because, as per her statement to the court of June 14, 1978, she experienced anti-semitism at work, in the street, in newspapers and in books. In her words : "In 1971 I applied for an exit visa to Israel. My decision came as a result of the extreme anti-semitism which I felt especially after 1948. All my life, and particularly following graduation from the Institute, I constantly felt and saw at work in the streets, and in books, an unmasked hatred, contempt, slander and taunting — forms of humilation of my national dignity." (The complete statement can be found in Annex 2 to the Petition to the Procurator-General of the U.S.S.R. a copy of which is attached to this Dossier as Appendix."

2. *The Unjustified Denial of the Right to Emigrate as a Matter of Law*

Indeed, the very reliance by the Soviet Union on stated — if not statutory — exceptions to the right of freedom of emigration provides the most compelling evidence of the acceptance of the right itself. And the very exceptions identified by the Soviet Union also provide the most compelling evidence of the violation of this right in the case of Ida Nudel.

In 1960, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities undertook a study of the right to leave and return, and charged the Phillipine Judge Inglés — a Special Reporter of the Sub-Commission — with the task of research. The Soviet

Union, in its submission to the Sub-Commission, (*Conference Room Paper* No. 85/Rev. I February, 1963) stated officially that the only three classes of persons to whom the right to leave is refused are:

1) an accused person waiting trial
2) an condemned person serving his sentence
3) a person who has not fulfilled his military obligations

It is noteworthy that, while there are many reasons that may be offered as grounds for refusing a visa, the Soviet Union has *officially* and *publicly* offered *only* these reasons for rejecting an application for a visa. Moreover, the Soviet submission advised that

> citizens may not be prevented, by membership in a particular racial, linguistic, political, religious or other group from entering or leaving the U.S.S.R.;

this proposition, read together with Articles 34 and 36 of the U.S.S.R. Constitution guaranteeing all Soviet citizens equality before the law in the exercise of their rights, also accords the right to leave the status of a fundamental right in *Soviet* Constitutional law, thereby buttressing the protection of this right afforded by Article 29 of the Constitution; and, in a futher comment, the Soviet government affirmed that it exercises

> no discrimination of any kind ... as regards the procedure and formalities connected with entry into or departure from the U.S.S.R. ...

Finally, the U.S.S.R. told the United Nations that with reference to appeals "through administrative channels" for exit visas, no discriminatory restrictions are permitted, and "any person who curtails that right (of appeal) is liable to a penalty".

None of these reasons apply to Ida Nudel. At the time of her first application to emigrate and now again, Ida Nudel was not an accused person waiting trial, a condemned person serving her sentence, or a personn who had not fulfilled military obligations; nor was Ida Nudel unable to comply with the usual "administrative practices" regarding exit visas i.e. medical certificate, joining of families, exit fee, etc. Indeed, the declaration by the Soviet Union at the Inglés Commission that it favours giving special consideration to the reunifaction of families ought to have secured Ida Nudel's right to emigrate, particularly after the emigration of her sister and sole surviving relative, and with the assurance that such reunification would follow.

3. *The Unjustified Denial of the Right as a Matter of Fact*

Ida Nudel's application to emigrate was refused in 1971 on the alleged grounds of "state interests". Apart from the fact that such grounds do not appear to be well-founded as a matter of *law* as set forth above, they have no basis as a matter of *fact*. For Ida Nudel has continuously maintained, then and since, that she was never in possession of any state secrets, or any information whose disclosure could be prejudicial to Soviet state interests. (See copy of letter of Ida Nudel to you of January 1986, attached herewith as Appendix C ; copy of letter of Ida Nudel to Foreign Minister E. Shevardnadze of January 1986, attached herewith as Appendix D ; and copy of affidavit of Ilana Friedman, sister of Ida Nudel, and attached herewith as Appendix B.)

4. *Any Alleged "State Secrets" Have Been Eclipsed by the Passage of Time*

Soviet authorities, as these letters disclose, appeared to confirm that Ida Nudel "did not know any secrets", but claimed that she "may have overheard something". Apart from her denial of this allegation, whatever merits such an allegation might have has simply been eclipsed by the passage of time. In the words of Ida Nudel :

> Is it possible that for these 14 years the secrets which I did not hear, still have not lost their relevance — despite the present tempo of scientific and technological development ? Any person, even not a very educated one, can understand that all the rumours have been forgotten and all the secrets have stopped being secrets.

5. *The Time-Period During Which Refusal For Alleged State Secrets was in Effect has Expired*

Soviet authorities have themselves acknowledged that the time frame for which this refusal on grounds of "state interests" was in effect continued only "until January *1977*". (See, for example, copy of letter of Canadian Parliamentarians and reference therein to statement of Alexander Yacovlev, former Soviet Ambassador to Canada, and attached herewith as Appendix F.)

In other words, beyond January 1977, there would not be *any* validity to a refusal of Ida Nudel's right to emigrate on grounds of "state interests". Yet, nine years *after* the expiry of the period wherein such a limitation of the right might be valid, and fifteen years *after* Ida Nudel's first application, permission to emigrate is still being denied.

It should be noted that Ida Nudel has been denied employment in her field since being dismissed from her job in 1971, and for the past 15 years has been working — when employed, in menial agricultural tasks. (See Affidavit of Ilana Friedman, 6-7 attached herewith as Appendix B.)

6. *Punitive Reprisals for Seeking to Exercise Right to Leave — Breach of Obligation not to Punish Applicants*

Most of the events described in the Affidavit, paragraphs 8-14, are directly or indirectly related to Ida Nudel's application to leave and be reunited with her family in Israel. In particular, in 1978, after seven years of refusal, loss of employment, harassment, surveillance, preventive arrests and the like, Ida Nudel hung a banner on her apartment balcony, saying "KGB give me a visa". For this exercise of her rights, otherwise guaranteed under the Soviet Constitution, Ida Nudel was tried and convicted of "malicious hooliganism," and sentenced to four years of exile in Siberia. (See copy of an Apppeal by way of Petition to the Procurator-General of the U.S.S.R. attached herewith as Appendix E.)

Since the conclusion of her sentence in 1982, Ida Nudel has again sought repeatedly to emigrate and be reunited with her sister; these applications have continuously been denied, and Ida Nudel continues to be subject to harassment, surveillance, detentions and searches; denied residence permits, adequate employment and medical care; and isolated in effective exile in Bendery, all of which has resulted in a serious deterioration in her health and spirit.

7. *Emigration of Ida Nudel — An Urgent and Compelling Case on Humanitarian Grounds*

Ida Nudel is seriously ill. Fifteen years of persecution have ravaged body and soul. (See Affidavit paragraphs 15-17). Her heart, kidneys and liver appear to be affected, and she may be cancerous. She is largely incapacitated, and has now lost the use of her right hand. After years of neglect (see especially Affidavit paragraph 16) by public health authorities she has lost faith in the local hospital system. She is in urgent need of serious medical intervention and hospital care, in a supportive environment, at the hands of trusted medical personnel and in the company of loving family. Recent communications with Ida indicate that her resolve may be eroding and she may be driven to acts of despair.

II. Denial of the Right to Family Reunification

In the "Human Contacts" Section of Basket III of the Helsinki Final Act, the signatories undertake to

> deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with their members of their family, with special attention being given to requests of an urgent character — such as requests submitted by persons who are ill or old.

This undertaking was further strengthened in the Concluding Document of the Madrid Follow-Up Conference (on the Helsinki Accords) wherein the signatories further undertook to deal with such applications favourably and "decide upon them in the same spirit."

It should be noted that the Helsinki provision respecting Reunification of Families is neither a substitution for, nor a reduction of, the obligation to respect the right to leave under the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights. Rather, it is an additional attempt to provide, within the general framework of the right to leave, favourable treatment to special cases on account of humanitarian conditions.

It is difficult to imagine a more compelling case on humanitarian grounds for family reunification then that of Ida Nudel. In a word, and as set forth above, Ida Nudel and her sister Ilana Freedman are the *only surviving relations* of a family that was wiped out in the holocaust. One would have thought that, even apart from any express international commitments, the Soviet Union — as evidenced, Mr. Gorbachev, by your own understanding of the importance of this right on humanitarian grounds alone — should have moved long ago to resolve this 15-year torment of separation ; I trust that you might now move to redress this tragic situation.

III. Denial of Rights Consequent Upon the Application to Emigrate — A Standing Breach of the Obligation Not to Violate Rights of Applicant

The Soviet Union, as a signatory to the Helsinki Final Act, expressly undertook that

> ... the presentation or renewal of applications [concerning family unification] will not modify the rights and obligations of the applicants... concerning, *inter alia*, employment, housing, residence state, etc.

Yet the fifteen years since the refusal of Ida Nudel's application in 1971 have been marked, as set forth above, by a continuing series of harassments,

surveillance, preventive arrests, dismissal from employment, denial or residence permit, — in a word, a pattern of prosecution and persecution of Ida Nudel for seeking nothing more than the right to emigrate and be reunited with her family. In the words of Ida Nudel, as appear on page 2 of Appendix B.

> Why, then, all this aggravation? And I only refer here to my short-term arrests, the trumped-up hooliganism charge presented against me, the trial, the 4 years of exile, the refusal of the authorities (who seemed to make a mockery of the law) to grant me a residence permit so that I could return after the term of exile to my own Moscow apartment, my expulsion from Moscow, the wonderings from town to town while seeking a residence permit and the forces expulsions, the fact that I was deprived of my private apartment — again in violation of the law, the constant bugging of any place where I lived, the theft of my letters and of correspondence addressed to me, the threats to which my friends have been subjected in order to bring about my isolation, the endless invitations to come to the police for "brainwashing" sessions, etc. etc. The list is endless.

Wherefore it is submitted that the Soviet Union should provide immediate relief — it not redress — by permitting Ida Nudel to emigrate.

IV. Corollary — Denial of "The Right to Know and Act Upon One's Rights"

A cornerstone of the Helsinski Final Act is Principle VII of the Act guaranteeing citizens of signatory countries the "Right to Know and Act Upon One's Rights"; while the Report of the Helsinki Conference of Human Rights Experts in Ottawa in May-June 1985 not only reaffirmed the central importance of this right, but expressly undertook to remove obstacles to the exercise of this right.

Yet, not only was there no removal of any obstacles to the exercise by Ida Nudel of her rights under Soviet and international law, but the rights themselves were denied, while the very attempt by Ida Nudel to exercise her rights to emigrate and be reunited with her sister has resulted in the loss of *all other* rights, the whole in clear violation of Principle VII.

V. Denial of the Right to Move within the State

Upon completion of her punitive term of exile in Siberia in March 26, 1982, Ida Nudel hoped to remain in her lawfully-possessed apartment in Moscow. However, the arbitrary refusal by Soviet authorities to renew her Moscow Residence Permit forced her to abandon her Moscow residence within 72 hours. For eight months, between April 1982 and January 1983, Ida Nudel was forced to move about the U.S.S.R., unable to settle in a place of

her own choice. She finally received a permit to reside in Bendery in February 1983, where she has continued to reside involuntarily to the present day, — and in utter isolation from any friends or associates.

Clearly, Ida Nudel does not wish to remain in the U.S.S.R.; but as long as she is forced to remain, she should at least have the right to reside in a place of her own choice in accordance with Article 13(1) of the Universal Declaration of Human Rights; Article 5(d)(I) of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 12(1) of the International Convenant on Civil and Political Rights which states as follows:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

VI. Denial of "National Minority Rights" — Including The Right to Culture, Education, and Language

This "core" set of rights finds expression in Articles 34 and 36 of the Soviet Constitution; in international instruments such as the UNESCO Convention against Discrimination in Education; the International Covenant on Civil and Political Rights to which the Soviet Union is a signatory; in the Sections on Culture and Education in the Helsinki Final Act; and in Principle VII of the Helsinki Final Act where signatories like the Soviet Union have pledged themselves to accord members of national minorities,

> the full opportunity for the actual enjoyment of human rights and fundamental freedoms, and will, in this manner, protect their legitimate interests in this sphere.

The right of national minorities are of particular importance in a multi-national state; and the Soviet Union is to be commended for the express inclusion of these rights in the Soviet Constitution, and their reaffirmation in international undertakings to which the Soviet Union is a signatory.

Regrettably, however, Ida Nudel has not only been denied "the full opportunity for the actual enjoyment" of these rights, but she has continuously been prevented from the effective exercise of any of these rights in association with the members of the Jewish minority. Indeed, her "coercive isolation" in Bendery, absent *any* contact with her co-religionists and members of her minority culture, has effectively nullified this core set of rights.

VII. Denial of Civil and Political Rights — Including the Right to Freedom of Expression, Association, Conscience and Religion, and the Right to Petition Government for Redress of Grievance

The Soviet Union is to be commended for its express guarantee, in the Soviet Constitution, of a whole panoply of civil and political rights, sometimes mistakenly, if not arrogantly, attributed to Western political systems; indeed, the Soviet Constitution is a veritable model of "political rights", and Article 49 expressly invites citizens to critique state bodies, while obliging officials to respond to citizen complaints.

Yet a review for the Ida Nudel case for the last fifteen years, (see, for example, Appendices B, C, and D) would reveal a litany of prosecution and persecution for taking *Soviet law seriously*; indeed, rather than commend Ms. Nudel for her fidelity to Soviet law and institutions, that very fidelity became the object of a criminal prosecution. Today, after over nine years have expired since that time regulated restriction, Ida Nudel still languishes in exile.

VIII. Denial of the Right to "Human Contacts"

This fundamental undertaking finds expression in the Preamble to Basket III of the Helsinki Final Act; in the substantive provisions of the Act itself which purport to protect "human contacts ... in all its aspects"; in the Concluding Document of the Follow-Up Conference at Madrid; and in the special C.S.C.E. Experts Meetings on "Human Contacts" which has just concluded in Berne, Switzerland, and where Human Contacts was the organizing theme of the Conference itself.

Yet again, the situation of Ida Nudel is a case-study in the denial of "Human Contacts", as in the interference with postal communication; the interruption of telephonic communication; the confiscation of books and materials from abroad; the exclusions of any visitations from abroad of co-religionists; the denial of any visit from her sister on humanitarian grounds or to permit Ida to even visit her sister; and the denial even, *within* the Soviet Union, of human contacts with *any* of her co-religionists, friends, or associates.

IX. Denial of the Integrity of the Person the Constituents of Human Dignity

One of the more compelling and pervasive principles of Soviet law is the *integrity* of the person — including *equallity* between persons — which finds

expression in the Fundamental Principles of Criminal Procedure of the U.S.S.R., the Code of Criminal Procedures of the R.S.F.S.R., the Soviet Constitution, and the international conventions which the Soviet Union has incorporated by reference into domestic law, such as the International Convention of Civil and Political Rights.

More particularly, Soviet law guarantees,

1) *The inviolability of the person* as substantively set forth in Article 54 of the constitution, Article 6 of the FPCP and Article 11 CCP; as protected in the procedural "due process" requirements set forth in Article 122 CCP and Article 32 FPCP; while the whole is affirmed in Article 9 of the U.N. Declaration of Human Rights and Article 9(1) of the International Covenant.
2) *The inviolability of Dwelling place*, as substantively set forth in Article 55 of the constitution, Article 6 of the FPCP, and Article 12 CCP, and which the procedural due process requirements regarding search and seizure clearly set forth in Articles 167–177 CCP; while the guarantees are affirmed by the corresponding provisions of Article 17 of the International Covenant of Political and Civil Rights and Article 12 of the United Nations Declaration on Human Rights.
3) *The privacy of citizens* and their correspondence, telephone conversations, and telegraphic communication as substantively set forth in Article 56 of the Soviet Constitution, Article 6 FPCP and Article 12 CCP; with the procedural due process requirements regarding protection of privacy set forth in Articles 169–171; while the guarantees are affirmed in Article 12 of the United Nations Declaration on Human Rights and Article 17 of the International Covenant of Civil and Political Rights.
4) *The right to protection against encroachments on honour and reputation* as set forth in Articles 57 and 58 of the Soviet Constitution, and as affirmed in Article 12 of the United Nations Declaration on Human Rights and Article 17 of the International Covenant of Civil and Political Rights.
5) *The right of all citizens to equality before the law* as set forth in Articles 14 and 245 CCP, Article 5 of the Law on Court Organization, and Article 74 of the Criminal Code; and as affirmed in Article 7 of the United Nations Declaration on Human Rights, and Article 2(1), 14(1) and 26 of the International Covenant on Civil and Political Rights and Article 7 of the Convention on the Elimination of all forms of racial Discrimination.

The notion, then of "human dignity" is clearly a generic concept in Soviet law; but in the indignities attending the persecution and prosecution of Ida

Nudel *each* of the above *guarantees* of human dignity is seen to "wither away". The continuing preventive arrests, detentions, interrogations and harassments are void of *constitutional* authority, impugning Ida Nudel's right to "inviolability of the person"; the repeated searches of Ida Nudel's person and dwelling place again lack constitutional authority, and are a clear denial of the "inviolability of the home"; the constant surveillance and interference with correspondence, telephone conversations and communications are a continuous denial of Ida Nudel's right to privacy; the pretrial "conviction" and public vilification in the media clearly abrogate Ida's right to protection against encroachment on honour and reputation; the imputed guilt by association with the Jewish emigration movement and prosecution for that association, is a clear denial of equality before the law; while the whole is a standing violation of both Soviet law and international human rights law incorporated by reference in Article 29 of the Soviet Constitution.

It is respectfully submitted, that only the provision of an exit visa can restore any semblance of human dignity; indeed, appropriate respect for the integrity of Ida Nudel's person would envisage indemnification for the illegal detention, false imprisonment, libel and slander, and invasion of privacy that have attended her prosecution over the years.

X. Denial of the Right to Medical Care

In the International Covenant on Economic, Social and Cultural Rights, the Soviet Union, in Article 12(1) of the Covenant undertakes to seek to provide for its citizens

> ... the enjoyment of he highest attainable standard of physical and mental health.

and, under Article 12(2)(d) seeks to ensure

> ... the creation of conditions which would assure to all medical service and medical attention in the even of sickness.

A similar set or rights and obligations find expression in Article 5(e)(iv) of the Anti-Discrimination Convention, as well as in the Universal Declaration of Human Rights, where Article 25(1) seeks to ensure every person's "right to a standard of living adequate for ... health and well-being including medical care"; as well, the Soviet Constitution provides a domestic constitutional underpinning for these rights.

Yet the events detailed in the Affidavit, paragraphs 15–17, constitute a continuing violation by the U.S.S.R. of Ida Nudel's right to proper and adequate medical care. The neglect and deprivation by hospital and other medical personnel, most notably in the short and only period of

hospitalization at Tomsk while in punitive exile in Siberia in 1980, have resulted in Ida losing trust and confidence in Soviet medicine.

Accordingly, having been abused for 15 years, Ida no longer trusts Soviet hospitals for any major operation or other medical intervention. Yet Ida is seriously, perhaps terminally ill, and personal tragedy may befall her unless she receives hospital treatment and medical care in a supportive environment of family and friends.

It is submitted that Ida Nudel's emigration is now a matter of urgent moment. Ida has been deprived of her most fundamental rights for 15 years. It would behove the Soviet Union — and fidelity to law — to move to redeem the life of Ida Nudel and spare her, and her family from having to endure any longer the pain and suffering of separation.