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The Conference on Security and Cooperation in Europe: Implications for Soviet-American Detente

Keywords

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I. INTRODUCTION

The Conference on Security and Cooperation in Europe (CSCE, and formerly known as the European Security Conference),¹ which was held in Helsinki, Finland from July 30 to August 1, 1975, prompted heated discussion both of the terms of the Final Act of the Conference and the policy of detente, as pursued by the Ford Administration.² Since the late summer of 1975, however, the Conference has all but disappeared as a focus for public discussions and as a consideration in the foreign policy of the United States.

1. The term Conference on Security and Cooperation in Europe refers to both the meeting of heads of state and government in Helsinki and to the lengthy process that led up to it. Preparatory talks were held in 1972, while Stage I, a meeting of Foreign Ministers, was held from July 3 to 7, 1973, at Helsinki. Stage II consisted of continuing negotiations by national experts in Geneva, which ran from September 18, 1973 to July 21, 1975. Stage III was the meeting of heads of state and government in Helsinki from July 30 to August 1, 1975, at which the Final Act, the product of more than two years of bargaining, was signed by the 35 participating States: Austria; Belgium; Bulgaria; Canada; Cyprus; Czechoslovakia; Denmark; Finland; France; German Democratic Republic (GDR); Federal Republic of Germany (FRG); Greece; the Holy See; Hungary; Iceland; Ireland; Italy; Liechtenstein; Luxembourg; Malta; Monaco; the Netherlands; Norway; Poland; Portugal; Romania; San Marino; Spain; Sweden; Switzerland; Turkey; the Union of Soviet Socialist Republics (U.S.S.R.); the United Kingdom; the United States; and Yugoslavia. The only European state not present was Albania.

The history of the CSCE can be found at M. PALMER, *THE PROSPECTS FOR A EUROPEAN SECURITY CONFERENCE* (1971) [hereinafter cited as PALMER]; W. KLAIBER, L. HADIK, J. HARNED, J. SATTLER & S. WASOWSKI, *ERA OF NEGOTIATIONS* Ch. 2, Apps. A-T (1973) [hereinafter cited as ERA OF NEGOTIATIONS]; W. KULSKI, *THE SOVIET UNION IN WORLD AFFAIRS* 112-16 (1973) [hereinafter cited as KULSKI]; Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 *AM. J. INT'L L.* 242, 261-62 (1976) [hereinafter cited as Russell]; Povolny, *The Soviet Union and the European Security Conference*, 18 *ORBIS* 200 (1974) [hereinafter cited as Povolny].

The complete text of the Final Act has been published at 14 *INT'L LEGAL MAT.* 1293 (1975); and 73 *DEP'T STATE BULL.* 323 (1975). The Final Act was divided into "Baskets" for negotiating and drafting purposes, and each has retained its distinct status, although the Final Act is considered a single document.

2. For example, Senator Henry Jackson, a Democrat, called the Final Act "yet another example of the sort of agreement that has become the hallmark of the Nixon-Ford Administration." *U.S. NEWS & WORLD REPORT*, Aug. 4, 1975, at 14. And Senator James Buckley, a Conservative-Republican, asked, "What the devil is in it [the declaration] for the West?" *TIME*, Aug. 4, 1975, at 16. See also Buchanan, *U.S. Weak, Blind, Foolish in Agreeing to Divided Europe*, *Rocky Mountain News*, July 29, 1975, at 27, col. 1.

The present comment is premised on the belief that an analysis of the background of the Conference and the terms of the Final Act serves two valuable functions. President Ford and Secretary Kissinger presented the CSCE as "a step in the process of detente,"³ which is currently the subject of a great deal of unstructured, unproductive debate within the government—particularly the Congress—and among the general public—especially in the context of a Presidential election year. The author believes that the format and the provisions of the Final Act of the CSCE provide an excellent framework within which to, first, define the notion of detente, and then to generate useful, informed discussion of detente, its value and its application.

Second, the Final Act, as was foreshadowed by its limited invocation in the context of the Portugese unrest of 1975,⁴ can be an important weapon in the diplomatic arsenal of the United States. Thus both the provisions of the Final Act, in which the participating states agreed upon criteria by which to judge each others' actions, and the forum for evaluation in a follow-up conference in 1977, provide a basis for an active U.S. policy toward the Soviet Union, particularly in the human rights field.

This comment will not deal with the question of whether American participation in the CSCE was a good idea at the time;⁵ the United States has signed the Final Act, so the question then must be, does it have value for U.S. policy, and if so, how can it be used? In Section II, we shall examine some of the significant provisions of the Final Act, while in Section III, we shall analyze the legal, political and moral weight to be

3. U.S. Department of State, Briefing Paper: CSCE Background (mimeographed, undated), at 4 [hereinafter cited as Briefing Paper].

4. Larrabee, *The Soviet Union and the Final Act of the Helsinki Summit*, paper presented at a meeting of the Atlantic Treaty Association, Feb. 23-24, 1976; reprinted at CONG. REC. S6603 (daily ed. May 5, 1976).

5. It would be well at this point for the author to express his belief that on balance, the Final Act is a good document, in the context of the relations of the period. Without advocating linkage between them, the CSCE must be evaluated in light of the Strategic Arms Limitations Talks (SALT), the Mutual and Balanced Force Reductions in Europe talks (MBFR), and the series of agreements on Germany and Berlin concluded in 1970 to 1972. The West did not agree to anything of significance to which it had not already agreed, and as we shall argue below, the potential for use of the Final Act and the follow-up conference is great.

attached to the Final Act. Finally, in Section IV, we shall formulate some conclusions about the CSCE and about detente, and make some recommendations for the future use of the Final Act of the CSCE in American foreign policy.

II. THE FINAL ACT

A. *Questions Relating to Security in Europe*

The section of the Final Act relating to security questions, the so-called Basket One,⁶ has received the most attention and criticism, but in reality it is a rather unexceptional document. Indeed, over time, the success or failure of the CSCE will probably be evaluated in terms of the implementation, or lack thereof, of Baskets Two and Three, those dealing with economics, technical and scientific cooperation and with human contacts.

While the provisions of Basket One, and particularly the Declaration on Principles Guiding Relations between Participating States, constitute an impressive statement of high intentions, they are, with a few noteworthy exceptions, merely reformulations of principles found in a number of multilateral instruments, such as the United Nations Charter⁷ and the U.N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,⁸ and bilateral instruments such as the Soviet-West German Treaty of 1970⁹ and the Basic Principles of Relations between the United States of America and the Union of Soviet Socialist Republics of 1972.¹⁰ To make this point is not to ignore the significance of the reaffirmation of such principles in the context of a European security conference, for it is that political context which gives the Final Act the political and symbolic importance it has.¹¹

6. There are essentially four separate parts to Basket One: a Preamble, the Declaration on Principles Guiding Relations between Participating States, Matters Related to Giving Effect to Certain of the Above Principles, and the Document on Confidence-Building Measures and Certain Aspects of Security and Disarmament.

7. Russell, *supra* note 1, at 261-62.

8. G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 85, U.N. Doc. A/8028 (1970) [hereinafter referred to as the Friendly Relations Declaration]. The Declaration is also found in BASIC DOCUMENTS IN INTERNATIONAL LAW 32 (I. Brownlie ed. 1972).

9. L. WHETTEN, GERMANY'S OSTPOLITIK: RELATIONS BETWEEN THE FEDERAL REPUBLIC AND THE WARSAW PACT COUNTRIES 224 (1971).

10. 11 INT'L LEGAL MAT. 756 (1972); 66 DEP'T STATE BULL. 898 (1972).

11. President Ford continually stressed that "we are not committing ourselves

The text of the Principles closely parallels the principles enunciated in the U.N. Friendly Relations Declaration, which was primarily a Soviet initiative to codify the notion of peaceful coexistence as a matter of international law.¹² Indeed, several principles are taken almost verbatim, with only stylistic changes.

Principle I of the Final Act deals with the sovereign equality of states and respect for the rights inherent in sovereignty, such as juridical equality, territorial integrity, and political independence.¹³ Two parts of this principle deserve closer attention. One is the sentence which states that "frontiers can be changed, in accordance with international law, by peaceful means and by agreement." The significance of this provision is seen in conjunction with Principle III, on the inviolability of frontiers.

It has long been recognized that a paramount concern of Soviet foreign policy has been the acceptance of existing frontiers in Europe, in particular the Oder-Neisse line and the frontier between the two Germanies.¹⁴ Indeed, such an acknowledgement has been linked with the idea of a European security conference for years.¹⁵ In Principle III, the Soviet Union obtained recognition of this long-sought-after objective. It states: "the Participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers."¹⁶

This principle, although sought for so long by the Soviets, and criticized so loudly in the West, is, in essence, nothing the

beyond what we are already committed to by our own moral and legal standards and by more formal treaty agreements, such as the U.N. Charter and Declaration of Human Rights." U.S. NEWS & WORLD REPORT, Aug. 4, 1975, at 18.

12. R. HIGGINS, CONFLICT OF INTEREST 101-03, 166-70 (1965); McWhinney, *The "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Cooperation Among States*, 60 AM. J. INT'L L. 1, 3 (1966).

13. Principle I. See Russell, *supra* note 1, at 263-64.

14. KULSKI, *supra* note 1, at 114; ERA OF NEGOTIATIONS, *supra* note 1, at 55-57; PALMER, *supra* note 1, at 18; Povolny, *supra* note 1, at 200.

15. Stressed by Leonid Brezhnev at both the 23rd and 24th Congress of the Communist Party of the Soviet Union (CPSU), in 1966 and 1971. 23RD CONGRESS OF THE CPSU 56 (1966); 24TH CONGRESS OF THE CPSU 37 (1971); see also PALMER, *supra* note 1, at 5, 18.

16. Principle II. See Russell, *supra* note 1, at 250-53.

parties have not heretofore accepted.¹⁷ The Federal Republic of Germany (FRG), which is the state most directly affected, accepted the principle in the legally binding treaties with the Soviet Union, Poland and the German Democratic Republic (GDR).¹⁸ The United States, as well, at the time of President Nixon's historic trip to Moscow in 1972, has accepted the notion of "inviolability of frontiers" in Europe.¹⁹ In addition to the verbal commitments, Western practice for 30 years has recognized the inability to change European frontiers.²⁰

What is new is the parallel recognition by the Soviet Union of the possibility of peaceful change of frontiers, a provision that was the *sine qua non* of West German participation in the CSCE.²¹ This is seen as allowing a future reunification of Germany. Since that prospect is received rather coolly from Washington to Paris to Moscow, the concession was of symbolic rather than of actual political significance.²²

Perhaps it would be best to state what Principle III does *not* do, for meanings have been attached to the Final Act that do not have any firm basis in its provisions. As much as the Soviet Union would wish otherwise, the Final Act does not constitute formal recognition of European frontiers, as would a peace treaty. Western participants, and President Ford in particular, have made this reading of the Final Act quite clear.²³

Essentially, the two provisions mark acknowledgement of the political reality that the risks inherent in keeping open the option of non-peaceful challenges to existing frontiers are simply too great in a nuclear world, indeed, if such challenges were

17. *Id.* at 249.

18. W. KULSKI, GERMANY AND POLAND: FROM WAR TO PEACEFUL RELATIONS Chs. 8, 9 (1976); KULSKI, *supra* note 1, at 132-37.

19. Joint Communique issued after the visit of President Nixon to the Soviet Union, May 29, 1972. 66 DEP'T STATE BULL. 899 (1972); N.Y. Times, May 30, 1972, at 18, col. 4.

20. See *e.g.*, ERA OF NEGOTIATIONS, *supra* note 1, at 61.

21. Russell, *supra* note 1, at 252-53; Schmidt, *What Americans, Soviets Gain from Helsinki Charter*, Christian Science Monitor, July 21, 1975, at 1, col. 4; TIME, Aug. 4, 1975, at 21; Briefing Paper, *supra* note 3, at 3.

22. KULSKI, *supra* note 1, at 124-26; TIME, Aug. 4, 1975, at 21.

23. U.S. NEWS & WORLD REPORT, Aug. 4, 1975, at 18; Briefing Paper, *supra* note 3, at 3, 4. The Congress has reaffirmed this interpretation by passing S.Res. 406. CONG. REC. 6599-6000 (daily ed. May 5, 1976).

ever feasible.²⁴ Officially, however, the United States maintains that only a formal peace treaty can definitively answer questions dealing with Germany,²⁵ and still refuses to recognize incorporation of the Baltic states by the Soviet Union.²⁶

The other frequent assertion about the effect of the Final Act is that it legitimizes Soviet hegemony in Eastern Europe. For an analysis of this point, we must turn back to our consideration of Principle I, and its relation to the infamous Brezhnev Doctrine, by which the U.S.S.R. sought to justify its invasion of Czechoslovakia in 1968.²⁷ In essence, the doctrine holds that socialist states have both a right and a duty to protect the gains of socialism wherever threatened, by whatever means. It has also been dubbed the doctrine of "limited sovereignty."

It was frequently stressed in the preparations for Helsinki that the West should strive for at least an implicit repudiation of the Brezhnev Doctrine.²⁸ The provisions of Principle I do, in effect, contradict the underpinnings of the doctrine.²⁹ In addition to the reference to sovereign equality, juridical equality, territorial integrity and to freedom and political independence, the principle states that the participating States "will also respect each others' right freely to choose and develop its political, social, economic and cultural systems . . ."³⁰ In conjunc-

24. A perceptive analysis of American incapacity, and unwillingness, to challenge the Soviet Union in Eastern Europe is found in Harsch, *Ford Prepares to "Ratify Yalta,"* Christian Science Monitor, July 25, 1975, at 26, col. 3. See also note 20, *supra*.

25. Briefing Paper, *supra* note 3, at 4.

26. President Ford in U.S. NEWS & WORLD REPORT, Aug. 4, 1975, at 18; Schmidt, *supra* note 21, at 19, col. 4.

27. The author believes this to be a misleading misnomer, in that the doctrine is merely a new formulation—in public—of old policy, as evidenced tragically in Berlin in 1953 and in Poland and Hungary in 1956. KULSKI, *supra* note 1, at 313-39; J. KORBEL, DETENTE IN EUROPE: REAL OR IMAGINARY? 101-03 (1972). Other useful treatments of the doctrine are found in T. FRANCK & E. WEISBAND, WORD POLITICS 33-40 (1972) and T. WOLFE, SOVIET POWER AND EUROPE 1945-1970 at 383-85 (1970).

28. Povolny, *supra* note 1, at 201, 218; N.Y. Times, Sept. 19, 1973, at 3, col. 6.

29. Russell, *supra* note 1, at 255-57; the Brezhnev Doctrine, however, has been declared dead before. Schwebel, *The Brezhnev Doctrine Repealed and Peaceful Coexistence Enacted*, 66 AM. J. INT'L L. 816 (1972). Like the reports of the death of Mark Twain, the reports of the demise of the Brezhnev Doctrine are greatly exaggerated, in the view of the author. One should have no doubts that if the Soviet Union perceived a threat to its control in Europe, it would act just as it did in Berlin, in Hungary and in Czechoslovakia, doctrine or no doctrine. Perhaps the area where the potential for East-West conflict is greatest—and the reach of the Brezhnev Doctrine most uncertain—is in Yugoslavia after Tito's death. ERA OF NEGOTIATIONS, *supra* note 1, at 60.

30. Principle I.

tion with Principle VI, on the non-intervention in internal affairs, "regardless of their mutual relations," and the statement in the Preamble that the principles should govern relations between states "irrespective of their political, economic or social systems,"³¹ this would seem to pre-empt the idea, basic to the Brezhnev Doctrine, that relations between socialist countries are governed by different principles than those between other states.³² While this interpretation should not be overestimated³³—such agreements inevitably fall when they conflict with perceptions of vital national interest—its symbolic value should be seen to be as great to the West as is that to the Soviet Union of the inviolability principle. Just as the Soviets are likely to use for propaganda purposes those provisions it favors, so the West should use those provisions which by their terms contradict the Brezhnev Doctrine.

The other Principles of the Declaration on Principles add little that has not been previously agreed to. They speak of refraining from the threat or use of force,³⁴ the territorial integrity of states,³⁵ the peaceful settlement of disputes,³⁶ non-

31. Preamble, para. 5. See Povolny, *supra* note 1, at 225, for a discussion of Soviet resistance to this provision. It should be noted that the Yugoslavs pushed this idea strongly. N.Y. Times, June 6, 1972, at 11, col. 1.

32. On the concept of international law between socialist states, see G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 427-47 (W. Butler trans. 1974); KULSKI, *supra* note 1, at 296-300; Lapenna, *The Soviet Concept of "Socialist" International Law*, in *THE YEARBOOK OF WORLD AFFAIRS* 1975 at 242 (1975); Shurshalov, *International Law in Relations among Socialist States*, in *CONTEMPORARY INTERNATIONAL LAW* 59 (G. Tunkin ed. 1969).

33. Secretary of State Kissinger apparently felt this interpretation to be valid. He characterized General Secretary Brezhnev's Helsinki speech, which stressed non-interference, as "conciliatory" and as pointing "both ways." It should be noted in this regard that Brezhnev made no exceptions for socialist states in his speech. For the text of his speech, see *CURRENT DIGEST OF THE SOVIET PRESS*, Aug. 27, 1975, at 12. See also Russell, *supra* note 1, at 256 n.39; Osborne, *Ford in Europe*, *NEW REPUBLIC*, Aug. 16 & 23, 1975, at 10; *NEWSWEEK*, Aug. 11, 1975, at 17-18; *Denver Post*, July 31, 1975, at 1, col. 3; *Denver Post*, Aug. 10, 1975, at 10, col. 1.

34. Principle II. See *ERA OF NEGOTIATIONS*, *supra* note 1, at 60-61; Russell, *supra* note 1, at 264-65.

35. Principle IV. It is significant that this principle stresses that no occupation of another state's territory is legal, which applies to the Soviet occupation of Czechoslovakia (not ratified by treaty until 1970, in the Treaty of Friendship, Cooperation and Mutual Assistance, signed May 6, 1970. 735 U.N.T.S. 218). Russell, *supra* note 1, at 265-66. It is also contended that the "illegal" incorporation of Latvia, Lithuania and Estonia by the Soviet Union are covered by this principle. *Id.* at 266. Cf. Mitchell & Leonhard, *Changing Soviet Attitudes toward International Law*, 6 GA. J. INT'L & COMP. L. 227, 294 (1976).

36. Principle V. See Russell, *supra* note 1, at 266-67.

intervention in internal affairs,³⁷ equal rights and self-determination of peoples,³⁸ cooperation among states,³⁹ and the fulfilment in good-faith of obligations under international law.⁴⁰ Principle VII, on human rights, will be discussed *infra*.

The last important aspect of Basket One is the "confidence-building" measures accepted by the participating States.⁴¹ Originally proposed by Canada,⁴² and actively supported by Yugoslavia and Romania,⁴³ they were opposed for a time by the Soviet Union, but were accepted at a fairly early stage in the preparatory discussions.⁴⁴ These measures include prior notification of military maneuvers, exchange of observers and prior notification of major military movements.⁴⁵ The effect of these "confidence-building" measures is by no means clear, as they have been invoked only in limited circumstances.⁴⁶

B. *Cooperation in Economics, Science, Technology and the Environment*

The provisions of Basket Two, although receiving perhaps least attention of the provisions of the Final Act, may in the long-run be among the most important results for the CSCE. Cooperation in this area has been an agenda item proposed by the Soviet Union since 1966.⁴⁷ In this light it has been suggested

37. Principle VI. See Russell, *supra* note 1, at 267-68. This principle should be read in conjunction with Principle VII; thus, human rights are *not* exclusively within the domestic jurisdiction of a state. *Id.* at 268.

38. Principle VIII. See Russell, *supra* note 1, at 269-70.

39. Principle IX. This principle recognizes the roles of "governments, institutions, organizations and persons" in the promotion of cooperation among states (emphasis added). The socialist states generally deny any applicability of international law to individuals. *Id.* at 270.

40. Principle X. See Russell, *supra* note 1, at 270-71.

41. Document on Confidence-Building Measures and Certain Aspects of Security and Disarmament.

42. N.Y. Times, Dec. 5, 1972, at 15, col. 5.

43. Sulzberger, *A Cold Peace for a Cold War*, N.Y. Times, Aug. 4, 1972, at 31, col. 6.

44. N.Y. Times, Jan. 23, 1973, at 8, col. 3; N.Y. Times, June 23, 1973, at 1, col. 1.

45. This last provision is heavily qualified, as the parties "may at their own discretion" notify of such movements.

46. See report in U.S. NEWS & WORLD REPORT, Aug. 9, 1976, at 28, 29.

47. Povolny, *supra* note 1, at 206. See generally M. GOLDMAN, DETENTE AND DOLLARS (1975) [hereinafter cited as GOLDMAN]; Z. NAGORSKI, JR., THE PSYCHOLOGY OF EAST-WEST TRADE (1974); S. PISAR, COEXISTENCE AND COMMERCE (1970); G. STEIBEL,

for some time that a central reason for the Soviet desire for detente is to obtain trade and technology from Western industrialized countries.⁴⁸ Economics and technical cooperation have been NATO discussion topics since at least 1969.⁴⁹

There is no general agreement as to the proper role that trade and economic relations should—or can—play in the general relations between states of differing social systems. Three major positions can be identified, each of which achieves a measure of support in the various analyses of detente.

The first position derives from the proposition that trade is and/or should be used as a means to desired political ends. This position is exemplified by the Jackson-Vanik Amendment to the Trade Act of 1974.⁵⁰ The Trade Act, finally passed on January 3, 1975,⁵¹ was designed to implement the Trade Agreement of 1972, one of the major results of the Nixon-Brezhnev summit of June 1972.⁵² The key provision was that granting most-favored-nation (MFN) status⁵³ to the Soviet Union. The Jackson Amendment, which passed with the Act, conditioned such a grant, however, on a showing to the Congress by the country seeking MFN status that free emigration was allowed to all its citizens.⁵⁴ The condition was, after some appearance of acceptance, heatedly rejected by the Soviet Union, which dismissed it as meddling in the internal affairs of the U.S.S.R.⁵⁵

This position of “politicizing” trade is based upon a belief

DETENTE: PROMISES AND PITFALLS ch. 4 (1975) [hereinafter cited as STEIBEL]; ERA OF NEGOTIATIONS, *supra* note 1, at 61-66.

48. KULSKI, *supra* note 1, at 57-61; ERA OF NEGOTIATIONS, *supra* note 1, at 61.

49. PALMER, *supra* note 1, at 14.

50. For the history of the Jackson Amendment, see V. PETROV, U.S.-SOVIET DETENTE: PAST AND FUTURE 18-23 (1975) [hereinafter cited as PETROV]; STEIBEL, *supra* note 47, at 39-45; Fitzpatrick, *Soviet-American Trade, 1972-1974: A Summary*, 15 VA. J. INT'L L. 39, 67-68 (1974) [hereinafter cited as Fitzpatrick]; Editor's Foreword, *Soviet-American Trade in a Legal Perspective*, 5 DENVER J. INT'L L. & POL. 217, 217-18 (1975); 69 AM. J. INT'L L. 652 (1975). See also 18 ORBIS 630 (1974); 18 ORBIS 983, 987-90 (1975).

51. P.L. 93-618 (1975).

52. Fitzpatrick, *supra* note 50, at 40-43; PETROV, *supra* note 47, at 16.

53. On MFN status with the Soviet Union, see Usenko, *Most-Favored-Nation Treatment in Soviet-American Trade Relations*, 5 DENVER J. INT'L L. & POL. 243 (1975); Metzger, *Most-Favored-Nation Treatment of Imports to the United States from the U.S.S.R.*, 5 DENVER J. INT'L L. & POL. 251 (1975); Fitzpatrick, *supra* note 50, at 66-68.

54. Editor's Foreword, *supra* note 50, at 217.

55. *Id.* at 218; 69 AM. J. INT'L L. 652 (1975).

that the fruits of the economic relations between the U.S.S.R. and the U.S.A. are far greater for the former than for the latter. Thus the argument runs that the chronically inefficient Soviet economy requires infusions of technology, capital and goods from the West, and that such infusions, while returning little to the West, greatly strengthen Soviet power in the world as well as improve the position of the leadership of the Soviet Union domestically.⁵⁶ Therefore, one analyst has concluded, "We should not help the Soviet Union economically and technologically unless we receive important political concessions in return"⁵⁷ Those concessions can be either in the sphere of politics and security⁵⁸ or human rights.⁵⁹

This variation of Dr. Kissinger's famous "linkage" theory was criticized recently in this JOURNAL by Professor Harold Berman. He argued that the linkage is "only as strong as the weakest link."⁶⁰ That is, in a linkage situation, a deterioration in economic relations could lead to a deterioration in the political sphere, as well as the inverse. He suggests that it would be a mistake to allow economic fluctuations to inhibit political relations, just as it would be a mistake to allow political ups and downs to determine levels of economic intercourse.⁶¹ To do so would be to return to the "anachronistic" policies of the 1950s.⁶²

Two further points have been put forward in this regard. First, Berman argues that there should be some symmetry between claims and responses in international relations, that the latter should be appropriate to the former. It is his contention that a policy as suggested above would be inappropriate and asymmetrical.⁶³ Second, the fate of the Jackson Amendment

56. G. NUTTER, *KISSINGER'S GRAND DESIGN* 23 (1975) [hereinafter cited as NUTTER]; Conquest, *A New Russia? A New World?*, 53 *FOREIGN AFFAIRS* 482, 493 (1975) [hereinafter cited as Conquest].

57. NUTTER, *supra* note 56, at 23.

58. Political concessions were suggested by NUTTER, *supra* note 56, at 23. The use of trade for political concessions has been suggested by members of a Democratic study group. *Denver Post*, Feb. 15, 1976, at 27, col. 2.

59. This is the approach upon which the Jackson Amendment was based.

60. Berman, *The Interaction of Law and Politics in Trade Relations Between the United States and the Soviet Union*, 5 *DENVER J. INT'L L. & POL.* 231, 234 (1975) [hereinafter cited as Berman].

61. *Id.*

62. *Id.*

63. *Id.* at 234-35.

certainly suggests that the Soviet leadership will be highly unlikely to agree to such demands, depending of course on the degree to which the Soviet Union needs the goods, credits or technology in issue.⁶⁴

The second major position on the role of trade is that it should be carried out in a politics-free environment to the mutual benefit of the parties; it is thus essentially a free trade notion. Professor Berman has argued for this approach of concentrating on economic advantage—"regardless of how good or bad our political relations may be and without the purpose of securing particular political advantages."⁶⁵ At the heart of this position is the concept of MFN status,⁶⁶ which means essentially that each trading partner should be treated equally.

Two main criticisms have been leveled at this position. First, there are those, such as Robert Conquest, who contend that such mutually profitable trade is impossible "for the perfectly simple reason that *Russia has practically nothing the West needs*" (emphasis in the original).⁶⁷ It is argued that there is very little trade in the sense of a two-way flow of goods, but rather deals like the grain deal which are goods for cash, or even more often, goods and long-term credits to allow payment.

The second argument is that deals that are made, while profitable for the individual corporation, are not necessarily good for the United States.⁶⁸ Conquest cites Lenin who allegedly said of Western hemp manufacturers, "they would happily turn a fast buck by selling him the rope to hang them with."⁶⁹

The third major position is that trade helps to bring about closer relations, and perhaps, peace.⁷⁰ This is akin to the func-

64. *Id.* at 235; Fitzpatrick, *supra* note 50, at 66-67.

65. Berman, *supra* note 60, at 232. Averell Harriman, the former Ambassador to the Soviet Union, and a leading Democratic foreign affairs expert, recently called for "normalization of trade" with the U.S.S.R. *Denver Post*, Feb. 15, 1976, at 27, col. 2. See also, Fritchey, *Uncle Sam Will Be Uncle Sam if the Grain Deal is Cancelled*, *Rocky Mountain News*, Feb. 23, 1976, at 29, col. 1; Kennan, *Is Detente Worth Saving?*, *SATURDAY REVIEW*, Mar. 6, 1976, at 12, 17. Like Professor Berman, Kennan argues for exploitation of those "exchanges . . . which would be mutually profitable." *Id.* at 17.

66. See note 53, *supra*.

67. Conquest, *supra* note 56, at 491.

68. "[T]his is emphatically not a case of what is good for Corporation X being good for America." *Id.*

69. *Id.*

70. NUTTER, *supra* note 56, at 19; Berman, *supra* note 60, at 231-32. It is also

tional approach to international relations,⁷¹ and the idea of a "tangle of hopes" that Professor Haas has invoked in similar analysis.⁷² Thus, Samuel Pizar has written that "[t]he tender sword that will open the East is economic and industrial cooperation and the human freedoms that go with it."⁷³

This creation of interdependence and thus closer relations is refuted as "extraordinary naivety."⁷⁴ It is argued that history shows no such correlation; indeed, in the 20th century most of the states that went to war were close trading partners. For example, before both World Wars, Germany was Russia's largest trading partner.⁷⁵ The critics of this position recall Norman Angell's eloquent pre-World War I book, *The Great Illusion*, in which he argued that the possibility of gain from war was rendered impossible by the network of commercial relations in the world.⁷⁶

It should be noted that the second two positions are not necessarily incompatible, and can be accepted together. Indeed, we shall see that elements of both are present in the Final Act.

In the Preamble to Basket Two, the participating States stated their conviction "that their efforts to develop cooperation in the fields of trade, industry, science and technology, the environment and other areas of economic activity contribute to the reinforcement of peace and security in Europe and in the world as a whole."⁷⁷ Further, they reaffirmed "their

contended that such trade would make life better for the average citizen in the Soviet Union. ERA OF NEGOTIATIONS, *supra* note 1, at 65.

71. D. MITRANY, *A WORKING PEACE SYSTEM* (1966); E. HAAS, *BEYOND THE NATION-STATE* (1964).

72. E. HAAS, *TANGLE OF HOPES* (1967). Secretary Kissinger refers to "a network of vested interests." Speech reprinted at 14 *THE ATLANTIC COMM. Q.* 20, 25 (1976).

73. Pizar, *The Changing Economic and Legal Environment for East-West Investment*, 10 *INT'L LAW.* 3 (1976).

74. Conquest, *supra* note 56, at 490.

75. *Id.* NUTTER, *supra* note 56, at 19. Cf. GOLDMAN, *supra* note 47, at 278-79. "The belief that trade leads to peace can sometimes be as much a product of fanciful hopes as of actual experience. Nonetheless, on balance, the likelihood of peaceful international relations seems to be greater with a reasonable level of mutually beneficial foreign trade than without it." *Id.* at 279.

76. NUTTER, *supra* note 56, at 19.

77. Preamble to Document on Cooperation in the Field of Economics, of Science and Technology and of the Environment, para. 1.

will to intensify such cooperation between one another irrespective of their [economic and social] systems."⁷⁸

In the section on commercial exchanges, the participating States agreed to promote the expansion of trade and "to ensure conditions favorable to such development."⁷⁹ In addition, they agreed to "foster a steady growth of trade while avoiding as far as possible abrupt fluctuations in their trade."⁸⁰

They further agreed to "endeavor to reduce or progressively eliminate all kinds of obstacles to the development of trade."⁸¹ And more specifically, they "recognize[d] the beneficial effects which can result for the development of trade from the application of most-favored-nation treatment."⁸²

The various sections of Basket Two consist of 33 pages of "guidelines and concrete recommendations,"⁸³ for the expansion of trade and cooperation in these areas. Among the undertakings are those to expand business contacts,⁸⁴ to improve the quantity and quality of economic and commercial information,⁸⁵ and to promote industrial cooperation and projects of common interest.⁸⁶

In science and technology, cooperation is foreseen in areas such as agriculture, energy production and conservation, transportation, computer technology, space, medicine and a host of other areas.⁸⁷ The participating States also agreed to cooperate in the environmental field—air pollution, water pollution, human settlements, and natural resources.⁸⁸ The document also contains provisions on the promotion of tourism,⁸⁹ and the improvement of the conditions of migrant laborers.⁹⁰

78. *Id.* at para. 4.

79. Section 1, para. 4.

80. Section 1, para. 10.

81. Section 1, para. 9.

82. Section 1, para. 5.

83. Preamble, para. 9.

84. Section on Business Contacts and Facilities.

85. Section on Economics and Commercial Information.

86. Industrial Cooperation and Projects of Common Interest.

87. Science and Technology, Possibilities for Improving Cooperation. See ERA OF NEGOTIATIONS, *supra* note 1, at 69-70.

88. Environment.

89. Promotion of Tourism. See ERA OF NEGOTIATIONS, *supra* note 1, at 67-68.

90. Economic and Social Aspects of Migrant Labor.

C. *Cooperation in Humanitarian and other Fields*

The Third Basket of the Final Act of the CSCE, dealing with human contacts—the flow of information and cooperation in cultural and educational relations between states—was the most contested part of the long negotiations leading to the Helsinki summit. Western pressure for the “free flow of people, ideas and information”⁹¹ was countered throughout the negotiations by Soviet resistance and claims of “ideological subversion.”⁹²

While presented from 1970 onward as a joint NATO position,⁹³ Britain, Germany and other Western European states were the prime movers in the areas of human contacts.⁹⁴ American policy was indifferent until 1974, when a more vigorous policy was followed.⁹⁵ The Western position from 1974 forward was essentially that there would be no Conference, and particularly no summit of heads of state, without Soviet acceptance of the essentials of Basket Three.⁹⁶

Western states were not alone in seeking freer contacts across national frontiers. The Yugoslavs, in particular, stressed the need for “a progressive opening of all possible channels for contacts and cooperation.”⁹⁷

91. PALMER, *supra* note 1, at 51, 104; Palmer, *A European Security Conference: Preparations and Procedures*, 28 *WORLD TODAY* 36, 42 (1972); Povolny, *supra* note 1, at 223.

92. N.Y. Times, Dec. 17, 1972, at 12, col. 3; N.Y. Times, Sept. 30, 1973, at 10, col. 1; N.Y. Times, Jan. 23, 1973, at 8, col. 2; N.Y. Times, Jan. 6, 1973, at 1, col. 1; Korey, *Good Intentions*, *THE NEW REPUBLIC*, Aug. 2 & 9, 1975, at 6 [hereinafter cited as Korey]; Povolny, *supra* note 1, at 225.

On human rights generally in the Soviet Union, see Reddaway, *Dissent in the Soviet Union*, *DISSENT*, Spring 1976, at 136 [hereinafter cited as Reddaway]. For eloquent and informative descriptions from within the Soviet Union, see A. SAKHAROV, *MY COUNTRY AND THE WORLD* 11-62 (1975); and R. MEDVEDEV, *ON SOCIALIST DEMOCRACY* chs. 4, 9, 10, 12 (1975) [hereinafter cited as MEDVEDEV]; and Amalrik, *Arrest on Suspicion of Courage*, *HARPER'S MONTHLY*, July 1976, at 37.

See also the Soviet Constitution of 1936, Ch. X. It is found in *BASIC DOCUMENTS ON HUMAN RIGHTS* 25-29 (I. Brownlie ed. 1971).

93. See PALMER, *supra* note 1, at 104, for an excerpt from the NATO Communique of Dec. 1970 on the ESC.

94. Korey, *supra* note 92, at 6; N.Y. Times, Sept. 27, 1973, at 15, col. 1 (Statements by Chancellor Brandt of the FRG and Foreign Secretary Home of the UK).

95. Korey, *supra* note 92, at 7.

96. N.Y. Times, Dec. 5, 1972, at 15, col. 5; N.Y. Times, Sept. 30, 1973, at 10, col. 1.

97. Acimovic, *The European Problem and the Perspectives on its Settlement*, in *PROBLEMES DE LA CONFERENCE EUROPEENNE POUR LA COOPERATION ET LA SECURITE* 11, 17 (1971).

The Soviet Union, and its socialist allies (it is interesting to note that Romania, which received MFN status just prior to the CSCE, and is highly regarded in the West for its independence of the Soviet Union, is at least as strong on this point as is the Soviet Union⁹⁸), were highly critical of Basket Three from the outset, seeing it as an invitation to "subversive activities"⁹⁹ and the introduction of "anti-culture" into socialist society.¹⁰⁰ In the earlier stages of the conference negotiations, the Soviets accepted the notion of human contacts as long as they took place "on the basis of respect for the sovereignty, laws and customs of each country."¹⁰¹ This idea was firmly rejected by the West as allowing selective interpretation of the provisions of the Basket, and was eventually dropped by the Soviets in 1973.¹⁰²

It is instructive to note what provisions the Soviet Union did not accept, and were thus not included in the Final Act. The United States had sought Soviet agreement to stop jamming Western radio broadcasts into Eastern Europe and the U.S.S.R., but failed.¹⁰³ In addition, the Western phrase "free flow of people, ideas and information" is not found in the Final Act despite significant pressure for its inclusion.¹⁰⁴ Much of the substance of the concept, however, is incorporated in the human contacts sections.

Before briefly reviewing the provisions of Basket Three, we must return to Basket One, the Declaration on Principles Guiding Relations between Participating States.¹⁰⁵ Principle VII concerns "Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or

98. See KULSKI, *supra* note 1, at 335. Romania's "independence" is limited to foreign affairs, while the internal regime is perhaps the harshest in Eastern Europe, with the possible exception of Bulgaria. *Id.* at 335-38. *Six Months After: The East European Response to Helsinki*, 14 THE ATLANTIC COMM. Q. 59, 64 (1976).

99. N.Y. Times, Jan. 6, 1973, at 1, col. 1.

100. N.Y. Times, Jan. 23, 1973, at 8, col. 5. "Anti-culture is 'pornography, the cult of violence, racism and slanderous, false propoganda.'" Povolny, *supra* note 1, at 225-26.

101. N.Y. Times, Jan. 6, 1973, at 1, col. 1; N.Y. Times, Sept. 19, 1973, at 3, col. 6; Povolny, *supra* note 1, at 226.

102. *Id.*

103. N.Y. Times, Dec. 5, 1972, at 15, col. 5; Rocky Mountain News, July 29, 1975, at 3, col. 5.

104. Povolny, *supra* note 1, at 226.

105. See Section II.A *supra*.

belief."¹⁰⁶ The provisions of Principle VII are not new, in that they parallel very closely the language of both the Universal Declaration of Human Rights¹⁰⁷ and the International Covenant on Civil and Political Rights.¹⁰⁸ What is significant, however, is the reaffirmation of the principle in this highly political document on *peace and security*, thereby underscoring the belief that human rights and their implementation are matters of *international concern*, both in their own right and because of their relationship to peace and security.¹⁰⁹

Indeed in Principle VII, the participating States agreed to "endeavor *jointly and separately*, including in co-operation with the United Nations, to promote universal and effective respect for them [human rights and fundamental freedoms]."¹¹⁰ Thus the participating States have recognized that human rights issues are legitimate subjects for bilateral and multilateral negotiations, as well as within the framework of the United Nations. As we shall argue below, this recognition of the proper scope of concern, in conjunction with the follow-up conference in 1977,¹¹¹ provides an important political tool for the West in dealing with the Soviet Union.

Two further points on Principle VII are appropriate here. First, the Principle explicitly recognizes the rights of national minorities to "equality before the law [and] . . . the actual enjoyment of human rights and fundamental freedoms." The participating States further agreed to "protect their [the minorities] legitimate interests in this sphere."¹¹² We will discuss

106. Principle VII, Declaration on Principles Guiding Relations between Participating States.

107. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948), arts. 18 and 2 [hereinafter cited as Declaration]. The Universal Declaration is conveniently found in *BASIC DOCUMENTS IN INTERNATIONAL LAW* 144 (I. Brownlie ed. 1972).

108. International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1967) [hereinafter cited as Covenant]. The Covenant is also found in *BASIC DOCUMENTS IN INTERNATIONAL LAW* 162 (I. Brownlie ed. 1972).

The Covenant came into force on March 23, 1976. See *After 30 Years, an International Bill of Human Rights*, 12 U.N. MONTHLY CHRONICLE, Apr. 1976, at 50.

109. This relationship is made explicit in the Final Act, both in the Preamble to the Declaration and in Principle VII itself, at para. 5.

110. Principle VII, para. 6. The U.S.S.R. has ratified the Covenant. 12 U.N. MONTHLY CHRONICLE, Apr. 1976, at 50, 52.

111. See *infra*, Section II.D.

112. Principle VII, para. 4.

this point further below. Second, the Principle invoked the U.N. Charter and the Universal Declaration, the states agreeing to “act in conformity with the purposes and principles [contained therein].” The International Covenants on Human Rights were also cited, recognizing that many of the participating States were bound by them, including the Soviet Union.¹¹³

The provisions of Basket Three, which cover 33 pages, were adopted by the participating States “conscious that increased cultural and education exchanges, broader dissemination of information, contacts between people, and the solution of humanitarian problems will contribute to the attainment of these aims” [“the strengthening of peace and understanding among peoples and to the spiritual enrichment of the human personality . . .”].¹¹⁴ This again constitutes recognition, albeit in a non-legal document, of the international nature of issues of human rights and contacts.

The major significance of the provisions of Basket Three—and the aspect which makes their future use possible in the context of the follow-up conference—is that they provide a number of *specific* areas to enhance transnational communication, contacts and cooperation, and provide for unilateral, bilateral and multilateral means to discuss and achieve these ends. To a great degree, what the Final Act does, therefore, is to give both specific content to many of the more general human rights principles¹¹⁵ in the context of a conference of all the states of Europe,¹¹⁶ and a process for continuing consideration and negotiation of these specific ends, and for evaluation of compliance with them.

The Basket consists of four sections. Section One deals with human contacts, the participating States “mak[ing] it their aim to facilitate freer movement and contacts . . . declare their readiness . . . to conclude agreements or arrangements among themselves, as may be needed . . .” to imple-

113. Principle VII, para. 8.

114. Preamble, para. 1, 2.

115. The need for explication of community expectations as to the content of human rights prescriptions is argued in McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387 (1974).

116. Europe for purposes of the CSCE includes the United States and Canada, but excludes Albania, which would not attend the conference.

ment those aims.¹¹⁷ The states further expressed "their intention now to proceed to the implementation" of the provisions of Section One.¹¹⁸

Among these provisions are those dealing with contacts and regular meetings on the basis of family ties¹¹⁹ and reunification of families across national frontiers¹²⁰ (the most frequent reason given for Jewish emigration from the U.S.S.R.). It is clear that these specific provisions are subclasses of the right of all persons, protected by both the Universal Declaration and the Covenant on Civil and Political Rights,¹²¹ to leave and enter their country. The importance of these provisions, then, is that they are specific, thus making evaluation of their implementation far easier than for more general formulations.

Further provisions of Section One include those dealing with marriage between citizens of different states,¹²² facilitation of travel for personal and professional reasons,¹²³ improvement of conditions for tourism,¹²⁴ encouragement of meetings among young people,¹²⁵ and other expansion of transnational contacts.¹²⁶

Section Two was designed to "facilitate the freer and wider dissemination of information of all kinds,"¹²⁷ in order to contribute "to the growth of confidence between peoples."¹²⁸ Thus the participating States "express[ed] their intention" to improve the circulation of, access to, and exchange of all kinds of information.¹²⁹ They agreed to facilitate dissemination of oral information,¹³⁰ printed information in the form of newspapers,

117. Section 1, Preamble, para. 5, 6.

118. *Id.* at para. 7.

119. Section 1(a).

120. Section 1(b).

121. See arts. 13 and 16(3) of the Declaration, *supra* note 107; arts. 12 and 23(1) of the Covenant, *supra* note 108.

122. Section 1(c). This again is covered in general terms by the Declaration, *supra* note 107, art. 16, and the Covenant, *supra* note 108, art. 23.

123. Section 1(d).

124. Section 1(e).

125. Section 1(f).

126. Section 1(h).

127. Section 2, Preamble, para. 6.

128. *Id.* at para. 2.

129. Section 2(a).

130. Section 2(a)(i). The Soviets, however, did not agree to cease jamming Western broadcasts, see text accompanying note 103. See also ERA OF NEGOTIATIONS, *supra* note 1, at 68-69.

periodicals and other publications,¹³¹ and filmed and broadcast information.¹³² The participants further agreed to work to improve the conditions under which journalists work, to ease visa requirements, travel opportunities, and communication with local sources.¹³³ In addition it was agreed that journalists should be allowed to “transmit completely, normally and rapidly” their information,¹³⁴ and that legitimate journalistic activity “will neither render journalists liable to expulsion nor otherwise penalize them.”¹³⁵

Section Three deals with cooperation and exchanges in the field of culture. The participating States agreed to extend relations between governmental and non-governmental organizations, increase mutual knowledge between cultures, promote fuller access to books and artistic works and performances, and to further develop contacts and cooperation among artists and others involved in cultural activities.¹³⁶ Section Four deals with cooperation and exchanges in the field of education. It provides for expansion of contacts and exchanges, improvement of access for foreign students and teachers to each other’s educational institutions, facilitation of travel and scholarships, cooperation in research in the sciences and humanities, as well as foreign languages and civilizations, and the promotion of cooperation in teaching methods.¹³⁷

Of note in Sections Three and Four, and particularly relevant to the Soviet Union, is a special provision recognizing the contribution and rights of minorities or regional cultures in the fields of culture and education.¹³⁸ The Soviet Union is a multinational state, and non-Russian nationalities make up one-half of the population of the U.S.S.R.¹³⁹ The Russian people are the

131. Section 2(a)(ii).

132. Section 2(a)(iii).

133. Section 2(c). The Soviet Union has agreed to relax restrictions on travel, although it is by no means unlimited. *Denver Post*, Mar. 2, 1976, at 18, col. 5.

134. Section 2(c).

135. *Id.*

136. Section 3.

137. Section 4.

138. Sections 3, 4. See also text accompanying note 112. Art. 27 of the Covenant, *supra* note 108, recognizes the rights of minorities in protection of their culture and language.

139. W. KULSKI, *THE SOVIET REGIME* 54-59 (1963); Ulam, *Smug Russians*, *THE NEW REPUBLIC*, Mar. 27, 1976, at 12, 13. On minorities generally in the Soviet Union, see Reddaway, *supra* note 92, at 143-49; MEDVEDEV, *supra* note 92, at chs. 4, 12; Keenan, *Soviet Time Bomb*, *THE NEW REPUBLIC*, Aug. 21 & 28, 1976, at 17.

“leading force of the Soviet Union and . . . the first among the equal and friendly family of the Soviet nations.”¹⁴⁰ While the rights of other nationalities are officially recognized—including the right to secede—the “russification” of the “Soviet people” and the elimination of “bourgeois nationalism” are seen as real threats to the non-Russian nationalities.¹⁴¹

As in the case of the provisions of Basket Two, the degree of implementation over time of the commitments made at Helsinki will determine whether the CSCE can be evaluated a success or a failure. In the conclusion, we shall suggest an approach to these human rights issues that will utilize Basket Three in a positive manner to bring about a loosening of some of the strictness presently found in a number of European societies, Socialist and Western alike.

D. *Follow-up to the Conference*

Basket Four has been the least discussed part of the Final Act, yet if the Act is to have any force over time, much of that force will derive from the pressures implicit in this last basket. The prospect for a conference in 1977 should make each participating State more aware of its commitments, and of the price of failure to implement those commitments.

The idea of a permanent standing committee to supervise implementation of the Final Act was originally a Soviet initiative.¹⁴² While the NATO powers were indecisive on a permanent organization,¹⁴³ several small Eastern European states pressed the idea forcefully in the negotiations. Over time, as the Romanians and Yugoslavs, in particular, continued their strong support, the Soviet Union became less and less supportive as the Soviet leadership came to see such an organ as a potential threat to Soviet policies both in Eastern Europe and at home.¹⁴⁴

The compromise arrangements eventually achieved at Helsinki fall into three parts. First, the participating States

140. W. KULSKI, *THE SOVIET REGIME* 127 (1963).

141. *Id.* at 127-35; Reddaway, *supra* note 92, at 144.

142. PALMER, *supra* note 1, at 56-58; ERA OF NEGOTIATIONS, *supra* note 1, at 70-71; Povolny, *supra* note 1, at 224; N.Y. Times, Jan. 23, 1973, at 8, col. 2. It was generally perceived as an attempt to replace NATO (and the Warsaw Pact). ERA OF NEGOTIATIONS, *supra* note 1, at 70.

143. PALMER, *supra* note 1, at 56; Povolny, *supra* note 1, at 226.

144. TIME, Aug. 4, 1975, at 21.

resolved to act to implement the provisions of the Final Act through unilateral actions,¹⁴⁵ bilateral negotiations,¹⁴⁶ and multilaterally, by meetings of experts and within the framework of existing international organizations, such as the Economic Commission for Europe and UNESCO.¹⁴⁷

Second, the parties resolved to "continue the multilateral process initiated by the Conference,"¹⁴⁸ through a "thorough exchange of views,"¹⁴⁹ and the holding of meetings of experts to "define the appropriate modalities for the holding of other meetings which could include further similar meetings and the possibility of a new Conference;"¹⁵⁰

Third, the Final Act provides for the first follow-up meeting to be held in Belgrade in 1977.¹⁵¹ The symbolic importance of the choice of Belgrade, and the potentialities for the use of the follow-up procedures, will be discussed further in Section IV.

III. LEGAL, POLITICAL AND MORAL EFFECT OF THE FINAL ACT

The status of the Final Act of the Conference on Security and Cooperation in Europe is even more tenuous than that ascribed to political treaties by President DeGaulle. He commented that "treaties are like young girls and roses; they do not last long."¹⁵² Political instruments, be they treaty or non-legal instruments, retain validity only so long as the instruments are seen to further the interests which originally created the basis of agreement.¹⁵³

The point that the Final Act is not a treaty or a legal document has been stressed heavily by President Ford¹⁵⁴ and

145. Section 1(a).

146. Section 1(b).

147. Section 1(c).

148. Section 2.

149. Section 2(a).

150. Section 2(b).

151. Section 3.

152. That DeGaulle made this statement shortly after ratification of the Franco-German Treaty of Cooperation and Friendship in 1963 certainly amplifies its meaning. W. KULSKI, *DEGAULLE AND THE WORLD* 278 (1966).

153. This point is well made in J. MILLER, *THE NATURE OF POLITICS* 148 (1962).

154. "I would emphasize that the document I will sign is neither a treaty nor is it legally binding on any participating State." *U.S. NEWS & WORLD REPORT*, Aug. 4, 1975, at 18.

many commentators.¹⁵⁵ The signatures of the heads of government were made "mindful of the high political significance which they attach to the results of the Conference, and declaring their determination to act in accordance with the provisions" of the Final Act.¹⁵⁶ The document has been termed a "declaration of good intentions,"¹⁵⁷ and a "statement of political resolve."¹⁵⁸ As such it is said to resemble the Universal Declaration of Human Rights and the UN Friendly Relations Declaration.¹⁶⁰

General Secretary Brezhnev, however, has intimated that some provisions are "of a binding nature,"¹⁶¹ apparently in reference to principles of inviolability of frontiers and non-interference, the provisions to which the Soviet Union attaches most weight and importance. While the assertion is evidence that the U.S.S.R. will probably interpret the Final Act selectively, it is unfounded. It is true that the language of the Declaration on Principles is less qualified than that of other sections,¹⁶² yet the participating States merely declared "their determination to respect and put into practice" those Principles,¹⁶³ and reaffirmations of the non-bindingness of the Final Act were plentiful. In addition, at the insistence of the Western states,¹⁶⁴ the Final Act, although negotiated by "baskets,"¹⁶⁵ is one document, with equal weight to be attached to each sec-

155. See e.g., *TIME*, Aug. 4, 1975, at 16; *Denver Post*, Aug. 3, 1975, at 17, col. 1.; Schmidt, *What Americans, Soviets Gain from Helsinki Charter*, *Christian Science Monitor*, July 21, 1975, at 1, col. 4; Kraft, *Ford May Gain Leverage at Helsinki*, *Denver Post*, July 30, 1975, at 22, col. 4. See also discussion in Russell, *supra* note 1, at 246-49.

156. Basket Four, Section 4, para. 6. Since the Final Act is not a treaty or legal agreement for purposes of art. 102 of the U.N. Charter (recognized at Section 4, para. 4), it cannot be invoked before any organ of the United Nations. Art. 102(2). See Russell, *supra* note 1, at 247.

157. *TIME*, Aug. 4, 1975, at 16.

158. Briefing Paper, *supra* note 3, at 4.

159. In the words of one analyst, the Declaration is "no more than a general statement of moral purpose and not a vehicle of legal obligation." D. GRIEG, *INTERNATIONAL LAW* 93 (1970) [hereinafter cited as GRIEG].

160. Friendly Relations Declaration, *supra* note 8.

161. *Denver Post*, Aug. 17, 1975, at 19, col. 1.

162. The most frequently-used verb is "will," whereas in the human contacts section the construction is "will favorably consider."

163. Preamble, para. 5, Declaration on Principles.

164. *TIME*, Aug. 4, 1975, at 17.

165. See discussion of each, *supra*, Section II.

tion.¹⁶⁶ Thus if the Soviet Union characterizes one section as binding, other states have an equally persuasive case for the binding nature of other provisions, such as those dealing with human rights.

The assertion of the non-legal nature of the Final Act has been made so frequently as to render it a truism. It is, however, like many simplifications, misleading, and could serve to de-emphasize important effects of the Final Act. The analogies to the Universal Declaration of Human Rights and the Friendly Relations Declaration¹⁶⁷ provide valuable insights for a balanced appraisal of the Final Act.

To say that the Universal Declaration is not a legal instrument *per se* is not to imply that it is devoid of legal, political and moral effect. It has been suggested, though not totally accepted, that the Declaration represents a norm of customary international law,¹⁶⁸ as recognized by Article 38(1)(b) of the Statute of the International Court of Justice.¹⁶⁹ It has also been argued that provisions of the Universal Declaration constitute general principles of law recognized by civilized nations,¹⁷⁰ as under Article 38(1)(c).¹⁷¹

It is not the intention here to characterize the Final Act as customary international law,¹⁷² but rather to suggest that it

166. It is true, however, that most of the provisions of the trade and human contacts sections require bilateral or multilateral negotiations to implement them, while the Principles are merely guides to state action. If the Soviet Union continues to suggest greater importance for the Principles, it will be difficult consistently—although consistency is not necessarily a virtue in diplomacy—to discount Principle VII, by which “[t]he participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.”

167. See text accompanying notes 158-61.

168. Separate Opinion of Vice-President Ammoun in Advisory Opinion on the Continued Presence of South Africa in Namibia (S.W. Africa), [1971] I.C.J. Reports 16. The Office of Legal Affairs of the U.N. Secretariat has written: “[I]n so far as the expectation [of compliance] is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.” Cited in W. BISHOP, *INTERNATIONAL LAW* 470 n.24 (3d ed. 1971).

169. Article 38: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . (b) international custom, as evidence of a general practice accepted as law; . . .”

170. BROWNLIE, *supra* note 8, at 144.

171. Article 38(1)(c): “. . . the general principles of law recognized by civilized nations . . .”

172. Russell, one of the U.S. negotiators of the Final Act, has written: “It [the Final Act] is viewed, however, as consistent with international law, and, given the

is not totally removed from the sphere of law. First, as time passes and the participating States conform to the various provisions, if in fact they do conform—which is of course the ultimate test of the success or failure of the CSCE—the Final Act could perhaps contain general principles by which states might be bound. Second, as provisions of the Final Act parallel or duplicate such instruments as the Universal Declaration, the Friendly Relations Declaration and the Charter itself,¹⁷³ the totality of pronouncements, in conjunction with State practice, can be evidence of customary norms of international law.

In addition, a significant indirect legal effect of both the Universal Declaration and the Friendly Relations Declaration derives from their nature as “evidence of the consensus . . . on the meaning and elaboration of the Charter.”¹⁷⁴ The Final Act can be seen in this light as well. For the participating States, it can be seen as a reformulation and refinement of the principles governing state behavior set out in the Charter and as such, arguably, have indirect legal effect,¹⁷⁵ or at least heightened political effect.

As the legal effects discussed above are tenuous at best, the substantial effects of the Final Act will likely be political and moral. Again, reference to the experience of the Universal Declaration exhibits the type of influence that a non-binding instrument can generate. As the Declaration itself states, it is “a common standard of achievement for all peoples and all nations,”¹⁷⁶ and as such serves as a benchmark by which state behavior is to be judged. According to one commentator, “its

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.” Russell, *supra* note 1, at 248.

It is ironic to note that the state which has initially suggested some legal force for the Final Act is the Soviet Union, while Soviet legal theory de-emphasizes the role of custom in international law. Lukashuk, *Sources of Present-Day International Law*, in *CONTEMPORARY INTERNATIONAL LAW* 164, 174-79 (G. Tunkin ed. 1969).

173. Some of the similarities between these documents have been discussed *supra* in Section II.

174. BROWNIE, *supra* note 8, at 32; see also statement of the French delegate to the Third Committee on the Declaration as “authoritative interpretation,” quoted in BISHOP, *supra* note 168, at 469 n.21.

175. In the Preamble to the Declaration on Principles, para. 4, it is stressed that the principles “are in conformity with the Charter of the U.N.,” in addition, there are numerous references throughout the document to the Charter, the Universal Declaration, and the Friendly Relations Declaration.

176. Preamble, para. 8.

political authority is now second only to that of the Charter itself."¹⁷⁷ This is not to say that states do not violate its provisions—and a look at any day's newspaper would certify that they do violate them—but it does provide a strong political and moral basis for protest and criticism of such violations. When a state commits itself publicly to a formulation of a policy, that formulation cannot be lightly set aside, even when not legally binding.¹⁷⁸

This approach to the results of the CSCE has been stressed by many commentators, as well as by President Ford. His statement expresses well the potential uses of the Final Act: "We are getting a public commitment . . . and establishing a yardstick by which the world can measure how well they [the Soviet Union] live up to these stated intentions."¹⁷⁹ This is particularly valid for the human contacts basket, where this kind of specific evaluation device has not existed previously.¹⁸⁰ Again, this is no guarantee of compliance, but such detailed provisions will be valuable in evaluating the performance of each participating State.¹⁸¹

A further political point that has often been lost in the discussions of the CSCE is that by discussing issues of human rights and contacts in a multilateral forum, and agreeing to work, independently and jointly, where necessary,¹⁸² to achieve

177. THE INTERNATIONAL LEGAL SYSTEM 624 (N. Leech, C. Oliver & J. Sweeney eds. 1973).

178. As Professor Franck has written, the pronouncements of states are "part of that trellis of reciprocal expectations on which the fragile international system grows." Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612, 616 (1975); see also T. FRANCK & E. WEISBAND, WORD POLITICS 120-21 (1971).

179. Denver Post, July 25, 1975, at 16, col. 3; U.S. NEWS & WORLD REPORT, Aug. 4, 1975, at 18.

180. Basket Three is 33 pages long and contains detailed provisions such as the two pages of recommendations on the improvement of working conditions of journalists, including the easing of travel restrictions, restrictions on personal contacts, and facilitating visas, etc. Section 2(c) of the Declaration on Cooperation in Humanitarian and Other Fields.

181. The point was well made by a U.S. official: "There is no court to take anybody into, but this document gives us some moral authority for saying 'You agreed. Why are you not living up to your word?'" TIME, Aug. 4, 1975, at 22.

182. Preamble, para. 3 states: "*Determined* therefore to cooperate among themselves, irrespective of their political, economic and social systems, in order to create better conditions in the above fields, to develop and strengthen existing forms of cooperation and to work out new ways and means appropriate to those aims"

the objectives set out in the Final Act, the participating States, and the Soviet Union in particular, have recognized that these issues are not purely internal matters, to be shielded from international concern.¹⁸³ The invocation of the notions of “non-interference” and “domestic jurisdiction”¹⁸⁴ has been the standard Soviet response to the raising of human rights questions, as evidenced by the fate of the Trade Act of 1974, and the Jackson Amendment.¹⁸⁵ Such a claim, while likely to be raised,¹⁸⁶ is less powerful in light of multilateral discussions of the issues, as at Helsinki.

Another point in this regard, alluded to earlier,¹⁸⁷ concerns the explicit recognition by the parties to the Final Act that issues of human contacts contribute to “the strengthening of peace.” Issues of peace and security, are, by definition, subjects of international concern; tying human rights to peace and security is a means of changing what otherwise might be considered issues of internal concern into issues on which international consideration is proper.¹⁸⁸

Governments are not insensitive to world public opinion¹⁸⁹—whatever it is conceived to be—especially to claims of illegality or immorality. Commentators have long been impressed—and generally dismayed—by how international law and moral principles can be marshalled for totally contradictory policies. An important corollary is often overlooked. Such uses of international law emphasize the importance govern-

183. Russell, *supra* note 1, at 260. See generally J. FAWCETT, *THE LAW OF NATIONS* 136 (1968); GRIEG, *supra* note 159, at 314-15; J. BRIERLY, *THE LAW OF NATIONS* 357 (6th ed. H. Waldock 1963). As these authorities demonstrate, a treaty undertaking in a particular area removes that area from “domestic jurisdiction.” The same argument, though less definitively accepted, can be made for the case of Basket Three of the Final Act.

184. Fawcett, *Human Rights and Domestic Jurisdiction*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 286 (E. Luard ed. 1967); GRIEG, *supra* note 159, at 318-22.

185. See note 50 *supra*.

186. As Professor Fawcett has pointed out, “the old Adam of sovereignty, the sire of domestic jurisdiction remains a potent force in the present international system.” Fawcett, *supra* note 184, at 302.

187. See Section II.C *supra*.

188. As, for example, in the case of South Africa and the U.N.’s fight against apartheid. South Africa’s racial policies have often been termed “a threat to the peace,” which triggers art. 39 and Security Council involvement.

189. Bilder, *The International Promotion of Human Rights*, 58 *AM. J. INT’L L.* 728, 733 (1964).

ments attach to the appearance, if not the substance, of legality, legitimacy and morality.¹⁹⁰

An example of this phenomenon is presented by the Soviet Union's seeming obsession with a European security conference as the legitimation of post-war expansion and hegemony. Even when, as argued earlier, the essence of that goal was already achieved, Brezhnev continued to press for the CSCE, as something approaching a surrogate peace conference for Europe.¹⁹¹ That the Soviet Union has felt the need to have formal ratification of its acquisitions suggests at least some sensitivity to legality and morality in international relations.¹⁹²

IV. CONCLUSIONS AND RECOMMENDATIONS

Much has been written about the current detente¹⁹³ between the United States and the Soviet Union.¹⁹⁴ There have been calls for a "national debate" on detente.¹⁹⁵ The dissatisfaction—the malaise of which Professor Korbelt speaks in his lecture¹⁹⁶—is widespread, and criticism of the policy of detente

190. Stern, *Morality and International Order*, in *THE BASES OF INTERNATIONAL ORDER* 133, 139, 154 (A. James ed. 1973).

191. Reportedly when asked by then-Chancellor Brandt why the Soviet Union placed such emphasis on the CSCE, General Secretary Brezhnev responded, "We want a document." *TIME*, Aug. 4, 1975, at 18.

192. In addition, that it was felt necessary to justify the invasion of Czechoslovakia publicly—and especially in light of the major repercussions and criticisms of the Brezhnev Doctrine—should not be forgotten.

193. The fact that the period of detente brought about by the Nixon Administration is not the first such period is often forgotten. This historical perspective is stressed in STEIBEL, *supra* note 47, at 4-10; Pipes, *Detente: Moscow's View*, in *SOVIET STRATEGY IN EUROPE* 12-18 (R. Pipes ed. 1976) [hereinafter cited as Pipes].

194. See, e.g., NUTTER, *supra* note 56; V. PETROV, *DETENTE: PAST AND PRESENT* (1975); Pipes, *supra* note 193; G. BALL, *DIPLOMACY FOR A CROWDED WORLD* chs. 6, 7 (1976); STEIBEL, *supra* note 47; Shulman, *The Future of the Soviet-American Competition*, in *SOVIET-AMERICAN RELATIONS AND WORLD ORDER: THE TWO AND THE MANY* 1 (Adelphi Paper No. 66, 1970); Birnbaum, *The Future of the Soviet and American International Systems*, in *id.* at 24; Sommer, *Detente and Security: The Options*, in *EUROPE AND AMERICA IN THE 1970S: I: BETWEEN DETENTE AND CONFRONTATION* 10 (Adelphi Paper No. 70, 1970); Tatu, *The East: Detente and Confrontation*, in *id.* at 17; GOLDMAN, *supra* note 47; J. KORBEL, *DETENTE IN EUROPE: REAL OR IMAGINARY?* (1972); Yergin, *In Faint Praise of Detente*, *THE NEW REPUBLIC*, May 29, 1976, at 17 [hereinafter cited as Yergin]; Rosecrance, *Detente or Entente?*, 53 *FOREIGN AFFAIRS* 464 (1975); Conquest, *supra* note 56; Morris, *Detente*, *N.Y. TIMES MAGAZINE*, May 30, 1976, at 7; Salter, *It Takes Two to Detente: or Can Russia Change Its Spots?*, 9 *INT'L LAW* 517 (1975); Draper, *Detente*, 57 *COMMENTARY* 25 (1974); Kennan, *Is Detente Worth Saving?*, *SATURDAY REVIEW*, Mar. 6, 1976, at 12.

195. E.g., Egan, *Kissinger Seeks, and Gets, a "Detente" Debate*, *Nat'l Observer*, Feb. 14, 1976, at 3, col. 1.

196. Korbelt, *Detente and World Order*, 6 *DENVER J. INT'L L. & POL.* 9, 13 (1976),

as pursued by the Nixon and Ford Administrations has come from all sides.¹⁹⁷

The disillusionment with detente derives basically, as Professor Korbelt argues, from the differing perceptions of detente held by the United States and the Soviet Union.¹⁹⁸ The misperception by Americans of what detente is, and what it can achieve, stems from two main factors. The first is the tendency discussed by Professor Korbelt for Americans to clutch at "easy answers."¹⁹⁹ The second is the nature of the diplomacy practiced by the Nixon Administration, and the way that detente was "sold" to the American public.

To the American people, detente appeared to be the end of the Cold War, the beginning of a "new relationship" of cooperation, and, perhaps, friendship between the Soviet Union and the United States.²⁰⁰ The Soviets frequently argue that detente is "irreversible,"²⁰¹ and the American public seemed to accept this interpretation. Furthermore, it was seen—or more accurately, hoped—that this detente governed all aspects of relations between the two states—that is, political, military, economic and ideological relations—everywhere in the world. Thus, when Soviet writers stress that there is no "cessation of the ideological struggle,"²⁰² this is seen to discredit the entire policy of detente. Soviet "adventurism" (as it is characterized in the West)—or legitimate support for national liberation movements (as seen from Moscow)—in Angola further reinforces the disillusionment.

The disenchantment is frequently expressed in the proposition that detente is a "one-way street," that concessions by

supra in this issue [hereinafter cited as Korbelt].

197. See, e.g., BALL, *supra* note 194, at chs. 7, 8; NUTTER, *supra* note 56; A. SAKHAROV, *MY COUNTRY AND THE WORLD* (1975).

198. Korbelt, *supra* note 196, at 13. This point is also argued persuasively by Richard Pipes in Pipes, *supra* note 193; see also PETROV, *supra* note 194, at 3-5. Petrov refers to the "asymmetry of national objectives." *Id.* at 3.

199. Korbelt, *supra* note 196, at 13.

200. Yergin, *supra* note 194, at 21. He cites former Secretary of Defense James Schlesinger's warning that, "detente means [to many minds that] the possibility of conflict has ended and we could afford unilaterally to disarm." *Id.*

201. Shattan, *How the Soviets See Detente*, *NEW LEADER*, Feb. 2, 1976, at 8, 9.

202. Arbatov, *Maneuvers of the Opponents of Detente*, *CURRENT DIGEST OF THE SOVIET PRESS*, Oct. 1, 1975, at 1, 5. See quotations cited in Korbelt, *supra* note 196, at 17-18.

the West in the political, military, economic and ideological spheres are not matched by reciprocal Soviet concessions.²⁰³ Without denying that in some cases negotiations were not balanced, much of this criticism stems from the misperceptions of, and unrealistically high expectations for the policy of detente.

The second set of factors leading to the disillusionment with the policy are direct results of the Nixon-Kissinger way of practicing diplomacy. As one analyst has put it, "Detente is now suffering from the fact that it was deliberately obscured as diplomacy and oversold as politics."²⁰⁴ The personalization of foreign policy—by both Nixon and Kissinger—was useful as a means of selling policy, but as the personalities fell from favor, the policy—regardless of its merits (which was often the way it was accepted)—has been denigrated in the public eye as well.²⁰⁵ Further, the penchant for secrecy and surprise of the Nixon years contributed to this disillusionment. Perhaps most damaging was the molding of the policy of detente to meet domestic purposes, most often, domestic political purposes.²⁰⁶

One of the major costs of detente which led to more disillusionment was in America's relations with Western Europe and Japan. Draper, among others, has argued that detente, as pursued, was "the attempt to solve our problems through our antagonists, without, or even at the expense of, our friends. Conceivably, we might have tried to bolster both fronts simultaneously, but this effort was never seriously made."²⁰⁷ A further, and still continuing problem is the total eclipse of Third World relations by "super power politics."

The disillusionment, and the connection of detente in many minds with discredited persons, have "gone beyond a healthy deflation of the Nixon Administration's puffed-up rhetoric and now are swinging towards an indiscriminate and

203. See, e.g., Yergin, *supra* note 194, at 18.

204. Morris, *supra* note 194, at 7.

205. Yergin, *supra* note 194, at 21, argues this well.

206. Morris, *supra* note 194, at 40. See J. SCHELL, *THE TIME OF ILLUSION* 246-47 (1976). Schell argues that the "image" of policy and of governing was the prime force behind Nixon policies. "President Nixon's reaffirmation of the doctrine of credibility disclosed in this foreign policy a practice that had come to govern most of his domestic policies: the practice of subordinating the substance of governing to the image of governing." *Id.* at 66. Thus it is argued that shortcomings in SALT I were the result of the political need for the agreement rather than the merits of the positions.

207. Draper, *supra* note 194, at 44.

short-sighted hardening of our positions."²⁰⁸ Thus the aim of discussion of the policy of detente must be to attempt, while eliminating illusions—"about its limits, about the character of the Soviet system or the expansionist elements in Soviet foreign policy"²⁰⁹—to develop the full potentialities of detente.

Secretary Kissinger has written that "[d]etente is a process, not a permanent achievement."²¹⁰ That is, contrary to the Soviet conception,²¹¹ detente is not irreversible, as past periods of detente demonstrate.²¹² Further, different aspects of relations, in different geographical areas, between the Soviet Union and the United States do not progress, or regress, at the same pace. Thus, the author believes that detente is not best approached as one concept, but rather, it must be analyzed in its various aspects, as well as in specific geographical contexts. Contrary to the simplistic conceptions of "indivisible" detente, the policy can best be understood and pursued by approaching each area separately.

The Final Act, then, by dividing the results of the CSCE into three baskets—political, economic, and humanitarian—is instructive.²¹³ We shall discuss each in turn. This is not to argue that there is no "linkage" among the fields, for relations in one area certainly affect other areas. In many cases, these linkages have negative effects in other areas. For example, the United States cancelled its participation in bilateral meetings on trade, energy and housing because of Soviet activity in Angola.²¹⁴ If these meetings have any value, to subject them to the uncertainties and instability of political relations seems unwise.

Political detente is based upon recognition of the realities of a nuclear world. "Detente is an imperative. In a world shad-

208. Shulman, *Priorities for Detente*, 14 *THE ATLANTIC COMM. Q.* 42 (1976) [hereinafter cited as Shulman].

209. Yergin, *supra* note 194, at 21.

210. Statement before the Senate Foreign Relations Comm., Apr. 14, 1974, at 518. Cited in NUTTER, *supra* note 56, at 91.

211. See, e.g., Shattan, *How the Soviets See Detente*, *NEW LEADER*, Feb. 2, 1976, at 8, 9.

212. See note 193 *supra*.

213. Professor Korbel analyzed detente in this manner in J. KORBEL, *DETENTE IN EUROPE: REAL OR IMAGINARY?* (1972). He entitled chapters: "Politics," "Economics," and "Ideology" (which I shall argue is where humanitarian concerns will fall).

214. *TIME*, Mar. 29, 1976, at 31; *Denver Post*, Mar. 16, 1976, at 1, col. 2.

owed by the danger of nuclear holocaust, there is no rational alternative to the pursuit of relaxation of tensions."²¹⁵ It is a relaxation—not an end—to tensions. And it is a relaxation that can be reversed. It is contended that if this is all that detente accomplishes, then it is little different from Cold War.²¹⁶

Most commentators recognize "stages" of detente, from the very limited conception of avoidance of war to positive and cooperative relations.²¹⁷ Generally, the detente between the Soviet Union and the United States has not progressed much beyond the point of conflict avoidance and crisis-limitation.²¹⁸ Further, it is in different stages in different areas of the world. Thus in Europe, where the fear of nuclear confrontation has been greatest, a fairly high degree of detente has been achieved, as evidenced by the CSCE. In areas of the Third World, on the other hand, proxy wars, while not ruled out, are to be limited so as to prevent the risk of nuclear confrontation. Thus, Soviet acquiescence in the mining of Haiphong harbor in May 1972 (two weeks before President Nixon's first visit to Moscow)²¹⁹ provides a better example of the workings of detente than does Kissinger's appraisal of the Angolan situation as "Soviet adventurism."²²⁰

This is what Secretary Kissinger terms a "dual policy that simultaneously and with equal vigor resists expansionist drives and seeks to shape a more constructive relationship."²²¹ As the critics of detente contend, the intentions of the Soviet Union are not substantially different today than they were in the period before President Nixon.²²² Tactical considerations make detente the best policy at the moment, but as circumstances change, so too might Soviet perceptions of tactical advantage

215. Kissinger, cited in NUTTER, *supra* note 56, at 87. See also Kissinger's speech of Feb. 3, 1976, reprinted in 14 THE ATLANTIC COMM. Q. 20 (1976); Shulman, *supra* note 208, at 43-44. Cf. Pipes, *supra* note 193, at 5. "We are told that detente is vital because the only alternative to it is a nuclear holocaust. This, however, is an appeal to fear, not to reason." *Id.* at 5.

216. Draper, *supra* note 194, at 38.

217. *Id.*; Kissinger speech in 14 THE ATLANTIC COMM. Q. 20, 22-23 (1976).

218. *Detente in Check*, 14 THE ATLANTIC COMM. Q. 45 (1976).

219. GOLDMAN, *supra* note 47, at 36; KULSKI, *supra* note 1, at 438-40.

220. Denver Post, Mar. 16, 1976, at 1, col. 2. Indeed Kissinger's attempts to match Soviet involvement was in line with this approach, but he was only prevented by Congressional disapproval.

221. Kissinger speech, 14 THE ATLANTIC COMM. Q. 20, 22-23 (1976).

222. Pipes, *supra* note 193, at 9-10.

change. Detente then “involves making somewhat more explicit the implicit rules of the Cold War—that neither side will push too hard in areas of the other’s vital interests; that some effort will be made to contain crises; that both sides will cooperate in avoiding nuclear war.”²²³

It also involves a higher level of communication between the leaderships of the two countries,²²⁴ which serves to enhance the function discussed above. It further involves “atmospherics,”²²⁵ or the perceptions of better relations. It is argued that perhaps the atmospheric outdistance the real achievements, leading to disarray in the West and reluctance to fully understand Soviet moves and build-ups.

The most important part of detente in this field is the separate discussions of SALT and MBFR, which will—if concluded—contribute substantially to a true lessening of tensions, and a meaningful curtailment of the technologies that threaten the peace. The political pronouncements have been made; it is now time to see if concrete results, seriously bargained, can be obtained. Whether this can be accomplished lacking the trust of which Professor Korbel spoke,²²⁶ remains to be seen.

Detente also means cooperative efforts, which Secretary Kissinger says will lead to a “pattern of relations” and a “pattern of restraint” that will bring about the higher stages of detente. This “network of vested interests” is in large part in the field of economics.²²⁷

In the matter of economics, an important distinction must be made between trade and what is more accurately considered aid.²²⁸ By trade is meant normal commercial transactions, goods for cash, or goods for goods exchanges. This is contrasted to what is in reality aid, that is credits, often long-term and on lenient terms.²²⁹ The distinction may be fuzzy at times, but it is nevertheless valid.

223. Yergin, *supra* note 194, at 17.

224. *Id.*

225. *Id.*

226. Korbel, *supra* note 196, at 18.

227. Kissinger speech, 14 *THE ATLANTIC COMM. Q.* 20, 24-25 (1976).

228. This distinction is recognized by G. KENNAN, *ON DEALING WITH THE COMMUNIST WORLD* 31 (1964) [hereinafter cited as KENNAN]; Draper, *supra* note 194, at 31-32.

229. KENNAN, *supra* note 228, at 31; Draper, *supra* note 194, at 32.

As George Kennan has argued, "The problem of East-West trade is, in short, primarily a political problem, and should be approached as such."²³⁰ Thus the decision to pursue or not to pursue trade with the Soviet Union should be seen as a political one. There is a further question, however. That is, if trade is to be pursued, are political goals best served by allowing trade on economic terms, or should political concerns govern not just trade generally, but its particular applications?

Kennan also contends that "[t]o demand political concessions as a *quid pro quo* for normal commercial transactions is, after all, only another way of renouncing trade altogether;"²³¹ Trade with the United States—as opposed to aid from it—is probably not so important to the Soviet Union that it will yield to political demands in return.²³² To link trade and politics, furthermore, would subject each area to the weaknesses and fluctuations of the other. Thus, the linkage is only as strong as its weakest link.²³³ The danger of subjecting political relations to the fluctuations of trade relations (and crop yields) is apparent; it is also unwise to allow trade decisions to be governed by the vagaries of political relations.

To subject trade to political conditions in this way is to deny two important political ramifications of such trade. First, there is leverage inherent in having trade—trade which is subject to diminution or cancellation if political relations deteriorate badly. There is thus a positive incentive to maintain stability in the politico-military sphere.²³⁴

Second, it is argued that trade can have beneficial effects on the internal system of the U.S.S.R. While this point is often taken much too far, it can be said that "the inflow of ideas and goods [and personnel] nevertheless has some impact and provides some momentum for those who otherwise have had no

230. KENNAN, *supra* note 228, at 31.

231. *Id.* at 32.

232. Secretary Kissinger has put it like this: "the Soviet Union has survived for nearly sixty years without American grain; it could do so now. Cutting off grain would still lose Angola." 14 THE ATLANTIC COMM. Q. 20, 35 (1976). Kennan argues that the effect of cutting off trade would, at best, "slow down, to a minor and undecisive extent, the advance of the Soviet economy." KENNAN, *supra* note 228, at 30.

233. Berman, *supra* note 60, at 234.

234. Shulman, *supra* note 208, at 44. Keatley, *The Give and Take of Detente*, Wall St. Journal, Aug. 4, 1975, at 10, col. 4.

hope for internal liberalization."²³⁵ The effect may be small, but it is likely to be greater than that achieved by demanding political concessions for trade.²³⁶

The amounts of trade will remain limited due to the lack of Soviet goods for Western consumers and the chronic shortage of hard currency in the Soviet Union, "but the market and the mutual needs are there."²³⁷ In addition to the political advantages of trade, the United States can benefit economically from trade with the Soviet Union. Not only does the balance of trade benefit,²³⁸ but individual enterprises, workers and farmers benefit as well.²³⁹

Aid—long-term credits, easy financing, etc.—presents a different picture. The Soviet Union needs, because of its inefficient economic structure, Western technology and capital. For much of this, the United States is often the only, or the best, source—unlike the case with consumer goods. Thus, the bargaining position of the United States is much better than in the trade area. The United States has no moral or other obligation to supply aid to the Soviet Union, as it arguably does to LDCs. Further, as the economic benefit is more tenuous and long-term, and the bolstering of the Soviet economy greater, political considerations should weigh more heavily in such decision-making.

Will the Soviet Union accept political conditions on aid? Professor Goldman has concluded that "under the proper conditions economic pressure can be used to win political concessions, particularly when the Soviet Union is in economic need."²⁴⁰ As the Soviet Union's economic position improves, their willingness to make concessions decreases, but the need for credits and technology, generally, can be expected to continue for some time.

What kind of concessions should be sought from the Soviet Union? The author believes that to seek politico-military concessions would be risky. As we have argued previously, for pol-

235. GOLDMAN, *supra* note 47, at 280. See also MEDVEDEV, *supra* note 139, at 320-21.

236. GOLDMAN, *supra* note 47, at 280.

237. *Id.* at 267. Cf. Conquest, *supra* note 56.

238. *Id.* at 276; Yergin, *supra* note 194, at 19.

239. GOLDMAN, *supra* note 47, at 276-77. Cf. Conquest, *supra* note 56.

240. GOLDMAN, *supra* note 47, at 69.

itical detente to be meaningful, there must be that level of trust that leads to sound bargaining.²⁴¹ That trust and those bargains cannot and should not be "bought." As Professor Goldman cautions, "it must never be forgotten that the minute the Russians feel they no longer need American goods [credits] or technology, their purchases from the United States may dry up as they did in the 1930s and the 1940s."²⁴² So too could previously made concessions "dry up" as Soviet needs decrease. To have, for example, a SALT agreement subject to such an uncertain future would introduce instability into the political arena that is highly undesirable and potentially dangerous. As we shall see, changes brought about in the human rights area are less easily shut off, and would have more lasting effects.

The failure of the United States to take an active human rights position throughout the world has been noted for years.²⁴³ The reluctance of the U.S. Government to denounce human rights violations in the period of detente was been criticized particularly strongly.²⁴⁴ Pursuit of human rights objectives has been seen to "interfere" with political objectives in relations with the Soviet Union.

What the Final Act of the CSCE does is demonstrate that human rights concerns are of an international nature, that they are appropriate for international negotiations, and that they are seen as an integral part of the Western conception of detente.

The Soviet Union continually stresses that there is no "ideological cease-fire,"²⁴⁵ and there is little reason to expect that stance to change, given Marxist-Leninist doctrine. Rather than decry this attitude and do nothing, perhaps it would be best for the West to accept this formulation, and pursue the "ideological struggle." By this, the author does not mean a return to Cold War rhetoric. As one commentator has written:

Since the Soviets do not seem to be dismantling this twilight apparatus, perhaps the West needs to become more sophisticated in coping with the dialectics and semantics of this form of elec-

241. Korbelt, *supra* note 196, at 18; J. KORBEL, *DETENTE IN EUROPE: REAL OR IMAGINARY?* 250 (1972).

242. GOLDMAN, *supra* note 47, at 283.

243. See, e.g., the excellent Symposium, 14 VA. J. INT'L L. 591 *et seq.* (1974).

244. See note 50 *supra*.

245. See Korbelt, *supra* note 196, at 17-18.

toral struggle. Not with the crude anti-Communist sloganeering of the past, but with more subtle discourse and more credible symbols which we are capable of evolving. Surely we need not fear to engage in a wide spectrum of East-West contacts on this front, even though our adversaries are trained Marxists; for the West has learned to live with dissent and pluralism and controversy and the East is very wary indeed of that sort of engagement.²⁴⁶

By the "ideological struggle," we mean the struggle of ideas and political freedoms, pursued by the flow of people and information.

It is not a struggle with the Soviet Union that the West can "win." It will be won—if at all—by the people of the U.S.S.R. Thus if there is to be any liberalization of the Soviet regime, it will come from within.²⁴⁷ While it cannot be forced from outside, that change can be aided from the West.

First, this can be done by persistently and publicly reminding Moscow of the commitments it has undertaken, whether in the Final Act, or in the Covenants, or in the Soviet Constitution. Further, the West should continually evaluate the performance of the Soviet Union²⁴⁸—and this is where the forum provided by the follow-up conference in Belgrade will be important.²⁴⁹ An important step has been taken in the passage

246. Barnett, *Comment*, in *THE NEW ATLANTIC CHALLENGE* 232, 233 (R. Mayne ed. 1975).

247. See MEDVEDEV, *supra* note 139, at 16; Larrabee, *supra* note 4, at S6606.

248. Of course, the Soviet Union has and will continue to question whether the United States has "clean hands" in this regard. "Really, what right do they have to pose as champions of the eternal values of freedom and democracy?—especially in the light of what has been going on in America in the past few years." Arbatov, *Maneuvers of Opponents of Detente*, *CURRENT DIGEST OF THE SOVIET PRESS*, Oct. 1, 1975, at 1, 5. Cf. Manning, *Goals, Ideology and Foreign Policy*, 54 *FOREIGN AFFAIRS* 271, 278-84.

In the long view, the surest way for the United States to influence for the better the ideological future of mankind everywhere is by being sure that we present an unwavering example of commitment to our principles at home. And that is an ideological target that can be—has been—set for all Americans.

.....

Nevertheless, the United States should continuously speak out internationally to reassert its ideological stance on individual freedom and expression. In time, the audience of the world will once more listen and respond. *Id.* at 284.

249. Current evidence of compliance by the Soviet Union is sketchy, but seems to show some compliance, but in selective areas and with limited scope. See Larrabee, *supra* note 4, at S6605-06; Radio Free Europe, *Six Months After: The East European Response to Helsinki*, 14 *THE ATLANTIC COMM. Q.* 59 (1976); Evans & Novak, *Russ*

of the Case-Fenwick Act,²⁵⁰ which establishes a Commission to monitor implementation of the Final Act. The author believes that such a Commission should be established at the NATO level, or among interested states, as such a body would have far more impact on the policies of the Soviet Union than would a unilateral body.²⁵¹

Second, the United States should use the political leverage inherent in aid to obtain concessions from the Soviet Union in this area. Unlike in the political sphere, advances in human rights are difficult to undo should the economic basis of the agreement disappear. While access to information may be cut off, what has already passed is in the hearts and minds of people, and cannot be expunged.²⁵² Further, the process of *samizdat* would allow continued circulation of information even if the source were cut off. Likewise, the memories of easier emigration, or freer travel, are difficult to erase once allowed.

Third, the West should continue to provide the information to the Soviet people that is denied them by their own government. This is the most important service that the West can provide to the Soviet people—the ammunition of the “ideological struggle” with the Soviet Union.

There are no “easy answers.” Detente is a complex, and often frustrating, phenomenon. It is not the “new relationship” that so many desire, in the East and in the West; it requires much the same vigilance that was required by the Cold War. But it is more than the Cold War; it has the potential to expand in scope and in application. Higher stages of detente are possible, but they will not be easily achieved, nor are they inevitable. Compared to the alternative of nuclear war, however, it is a policy that must be pursued.

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Flout Helsinki Agreement, Denver Post, June 21, 1976, at 18, col. 5. See also remarks of Congressman Drinan, CONG. REC. H4435 (daily ed. May 17, 1976).

250. S.2679. See CONG. REC. S6600-09 (daily ed. May 5, 1976); CONG. REC. H4432-44 (daily ed. May 17, 1976).

251. Remarks of Congressman Derwinski, CONG. REC. H4436 (daily ed. May 17, 1976).

252. See MEDVEDEV, *supra* note 139, at 315. “Ideas that take possession of the masses are now almost directly capable of becoming a ‘material force.’” *Id.*

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