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NOTES

After the Wall: The Legal Ramifications of the East German Border Guard Trials in Unified Germany

Micah Goodman*

Introduction

Since the reunification of East and West Germany in 1990, the German government has tried over fifty former East German soldiers for shooting and killing East German citizens who attempted to escape across the East-West German border. The government has also indicted a dozen high-ranking East German government officials. The German government charged and briefly tried Erich Honecker, the leader of the German Democratic Republic (G.D.R.) from 1971 to 1989, for giving the orders to shoot escaping defectors. While on guard duty at the border between the two

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1. When this Note refers to “the German government” or “the government,” absent specification of East or West, it refers to the government of post-1990 unified Germany.

2. This Note was written in the spring of 1995. Therefore, although the author has tried to update facts and figures to reflect current reality, some information may be outdated. Former East German soldiers, however, continue to be indicted for pre-Unification crimes. As such, this Note’s premise remains topical.

3. In June 1991, the Government brought the first such indictment against four East German border guards. At that time, the Minister of Justice of Berlin announced that it was investigating 175 shootings at the Berlin Wall. John Tagliabue, Berlin Wall Guards Accused of Shooting Escapes, N.Y. TIMES, June 16, 1991, at 1, 6.


5. The East German government originally brought charges against Erich Honecker in June, 1990, before the unification of Germany. The charges related to the murder of East Germans who tried to escape under his regime and to the use of automatic weapons.
Germanys, the soldiers allegedly shot and killed nearly 600 East German citizens who attempted to escape to the West.\(^6\) Government officials, acting under Chairman Honecker, allegedly took part in giving the orders to shoot.\(^7\) The charges against the former guards and officials have ranged from murder to manslaughter, and the German government continues to bring indictments.\(^8\)

The border guard trials have caused much controversy. The German Supreme Court recently held the trials constitutional under the Constitution of the former West Germany.\(^9\) But, was that ruling correct? This Note will examine the ramifications of trying East German soldiers as criminals under East German law. The prosecution's argument is that the border guards violated the East German Penal Code, which prohibited murder.\(^10\)


7. Whether the government gave explicit orders to shoot escaping citizens has been a central issue of controversy in the border guard trials. Guards have claimed that, although they may have shot attempted escapees, they were only following orders. Marc Pitzke, *East German Border Guards on Trial Viewed Defectors as “Pigs,”* REUTERS NORTH AMERICAN WIRE, Sept. 4, 1991, *available in* LEXIS, Int-News Library, Arcnews File (quoting one of the defendant border guards in the first trial. The guard stated that “[w]e were obliged to stop escape attempts by more than one person with the use of firearms. I only acted according to orders. I had absolutely no chance to treat this person any other way.”). See *infra* notes 116-129 and accompanying text.

8. In June, 1996, one of the most recent indictments ended with a border guard receiving a three-and-a-half-year prison sentence. *Three-year Prison Term Given to Berlin Wall Border Guard*, AGENCE FRANCE PRESSE, June 21, 1996, *available in* LEXIS, News Library, Curnws File. The guard was convicted of killing a West German doctor who had crossed the Berlin Wall from West Berlin in 1981, bringing to 41 the number of adjudicated border guard trials. *Id.* Not all of the trials have resulted in murder convictions. See Kerstin Rebien, *Court Hits E. German Leaders with Arrest Warrants*, REUTERS WORLD SERVICE, Nov. 14, 1996, *available in* LEXIS, News Library, Curnws File (stating that only 29 border guards have been convicted of murder). Of the trials that have resulted in convictions, most have also been followed by suspended sentences. *Id.; Three-year Prison Term Given to Berlin Wall Border Guard*, supra. See also *infra* note 131.


The Supreme Court's holding was the culmination of an appeal by former East German Defense Minister Heinz Kessler, his top aide Fritz Strelitz, and former communist boss Hans Albrecht. They were appealing their 1993 conviction for responsibility for the orders to shoot to kill East German citizens attempting to escape to West Germany. See *infra* note 111. The effect of the Supreme Court's holding will be that "border guards who shot those seeking to escape and top officials who framed communist East Germany's border policy are liable for their actions under federal German law." *Court Clears Way for East German Trials*, supra.

10. Article 112 of the East German Penal Code provided that murder was a crime punishable by ten years to life in prison. Penal Code of the German Democratic Republic of January 12, 1968, art. 112 (Murder), *reprinted in* LAW AND LEGISLATION IN THE
However, from the East German point of view, that statute conflicts with the orders given border guards, which allowed shooting anyone escaping to the West as a last resort. The crucial issue is whether the standing order for the border guards to shoot defecting East Germans was legal. If the law was valid, Germany should not prosecute soldiers for obeying it.

Part I of this Note will briefly detail the history of the events leading up to the trials, including accounts of the border guards’ actions. An important component of this issue is the question of who had authority over the border guards. Part II will describe the current situation regarding the various trials of the border guards and higher officials. Part III will describe and analyze East German law, as set out in the Penal Code and the Constitution of the former G.D.R. Those documents address such issues as illegal emigration, murder, and the punishment for both. The courts must use the documents to determine the legality of shooting escaping citizens. Part IV will examine both the criminal and constitutional roles of international law in the G.D.R. It is important not only to determine if the order to shoot defectors violated East German law, but also whether it violated international law. Finally, Part V will attempt to determine whether Germany has jurisdiction to adjudicate crimes committed in East Germany, a country with a different criminal code.

At issue are claims for actions which took place in a different state, under a different legal system. This Note will conclude that the orders, to shoot to kill defectors, given by high officials to the border guards were legal. If the orders were legal, then so too, by extension, were the actions. Therefore, German courts do not have jurisdiction to adjudicate claims against either former East German border guards or the leaders they served.

I. Background of Dispute

A. Post-War Germany—Division

After the Allied victory in the Second World War, Germany was divided into four zones of administration: American, British, French, and Soviet. The four powers were to occupy Germany jointly for a brief period to ensure that the country underwent proper “denazification, demilitarization, democratization, decentralization, and decartelization.” However, it became quickly apparent that a fundamental ideological rift existed among the Allies. Great Britain, the United States, and eventually France,
wanted to allow Germany to industrialize rapidly so as to free the West from the burden of supporting the country. However, the Soviet Union had no such desire.16

The most significant step toward the final and complete alienation of the western from the eastern section of Germany occurred in 1948. In that year, the Western occupying powers both extended the Marshall Plan of economic aid and introduced a new currency into their respective zones of occupation, excluding the Soviet zone.17 This move consolidated the western zones.18 The Soviet Union retaliated by blockading West Berlin and cutting off supply lines from West Germany to the now-isolated city in the eastern zone.19

The West was able to airlift sufficient supplies into West Berlin to keep the city alive until the Soviets lifted the blockade in 1949.20 However, the Berlin blockade severely strained relations between the Soviet Union and the West.21 This marked the beginning of the Cold War. More importantly for the future of Germany, the blockade convinced the Western powers that they must act swiftly and decisively.22 The Western powers accelerated the political development already underway: in 1949, the three Western zones officially became the Federal Republic of Germany (F.R.G.)—West Germany.23 Later that year, the Soviets turned their zone into the German Democratic Republic (G.D.R.)—East Germany.24 Germany's division had become a fact of international politics.25

From the beginning, East Germany could not compete economically with West Germany. The F.R.G. quickly became an economic powerhouse with the benefit of Western aid.26 By contrast, the G.D.R. government chose to centralize the means of planning and production, and the economy stagnated from the outset. Within a few years of the division of Germany, the G.D.R. became one of the most centrally planned economies in

many, it became clear that the Soviet Union saw things very differently from the West. The Soviet Union was engaged, for example, in a "systematic campaign to stifle western-oriented political movements that had begun to re-emerge in the rubble of the city." Id.

17. Id. at 23-24.
18. GELB, supra note 15, at 32.
19. Id. at 33-34.
20. TURNER, supra note 12, at 26-27.
22. TURNER, supra note 12, at 27.
24. Id.
26. The F.R.G. instituted a system of welfare capitalism, which combined private ownership and production, subject to market forces, with the governmental intervention of a welfare state, to insure a more even distribution of productivity. TURNER, supra note 12, at 58. The success of the policy of welfare capitalism quickly became known as an economic miracle (Wirtschaftswunder), and the F.R.G. saw enormous economic growth. Id. at 59. Industrial output continually increased, wages rose, and luxury goods, such as cars and electronic appliances, became commonplace. Id. at 59-60.
the world.\textsuperscript{27} The government of the G.D.R. discouraged private enterprise and, by 1952, over three-quarters of the industrial workers in the G.D.R. worked in state-owned enterprises.\textsuperscript{28}

The East German centralized economy achieved a certain economic success, marked by significant industrial output.\textsuperscript{29} However, this success failed to meet the peoples' needs.\textsuperscript{30} There was no effective allocation of resources, capital productivity was low, raw materials were wasted, and there was no incentive to keep technologically current.\textsuperscript{31} As a result, prices did not reflect value. The supply of basic goods was erratic, and most people could not afford luxury goods, even if such goods were available.\textsuperscript{32} Indeed, it was common to go outside the official supply system; citizens resorted to barter, rather than dealing in cash.\textsuperscript{33}

The failure of the G.D.R.'s socialized economy, combined with a politically repressive regime, led to an enormous outflow of people to the West.\textsuperscript{34} Between 1949 and 1961, over 2.5 million East Germans, from a


\textsuperscript{28} TURNER, supra note 12, at 109.

\textsuperscript{29} \textit{Id.} at 111-12.

\textsuperscript{30} Despite attempts to convince the citizens of the G.D.R. that their lives were as good as those of West Germans, the East German government was not able to disguise the difference in living standards between the two countries. GELB, supra note 15, at 39. The gap in living standards only increased as the Soviet Union extracted much of the G.D.R.'s industrial profit, labelling it war reparations. TURNER, supra note 12, at 111. The Soviet Union sometimes dismantled and shipped entire factories out of the G.D.R. Attempts to centralize agricultural production, manufacturing, housing construction, and the distribution of goods made things worse. The result was endless shortages and recurring bottlenecks, and “[a] cloud of discontent settled over East German workers and professionals.” GELB, supra note 15, at 40.

\textsuperscript{31} KEITHLY, supra note 27, at 64-66.

\textsuperscript{32} \textit{Id.} at 67. G.D.R. prices for durable goods were, by any standards, exorbitant. The waiting lists to purchase were equally bad. The Trabant, one of the two cars produced in East Germany, was made of fiberglass, not steel. With a two-stroke engine, it was capable of top speeds of little more than 50 miles an hour. Nevertheless, it cost over 20,000 Marks, more than a year's salary, and was available only via a ten-year waiting list. \textit{Id.}

\textsuperscript{33} For an amusing account of how the barter system typically worked, see ROBERT DARNTON, BERLIN JOURNAL, 1989-1990, at 148-56 (1991). Darnton tells the story of two Trabant repairmen and what people with broken cars had to do to get them fixed. It was impossible to obtain parts through the state system. People required resourcefulness to find many goods, and often could only put them to use through barter. \textit{Id.} at 150.

\textsuperscript{34} TURNER, supra note 12, at 109-10. Rather than lose their independence under privatization, many farmers and independent business people left. They were accompanied by “those East Germans who could not accept the increasingly stringent ideological constraints in intellectual and cultural activities.” \textit{Id.}
total population of about 17 million, fled to the West.\textsuperscript{35} To stem the tide, in 1961 the East German government closed off the entire 858-mile border between the two states.\textsuperscript{36} The only part of the border that remained open was in Berlin where the three Western Allies still maintained military forces.\textsuperscript{37} From 1949 to 1961, between 100,000 and 330,000 East German citizens left the G.D.R. each year,\textsuperscript{38} virtually all of them through Berlin.\textsuperscript{39} Their number amounted to twenty-five percent of the G.D.R.'s original population.\textsuperscript{40} From the East German point of view, something had to be done.\textsuperscript{41}

B. The Wall

1. Construction

In 1961, in response to the flood of departures to the West, Erich Honecker, then the second highest ranking official in the G.D.R., supervised the building of the Berlin Wall.\textsuperscript{42} Built on August 13, 1961,\textsuperscript{43} the

\textsuperscript{35} A. James McAdams, Germany Divided: From the Wall to Reunification 5 (1993).

\textsuperscript{36} GELB, supra note 15, at 39. The G.D.R. closed off the border everywhere but in Berlin. In so doing, the G.D.R. implemented the practices that it would maintain with heightened care and efficiency within Berlin after 1961, the year the Berlin Wall went up. The border between the two Germanies was what became known as the Iron Curtain—barbed wire running the length of the country, surrounded by land mines, supplemented by guards with machine guns in watch towers with searchlights. \textit{Id.}

\textsuperscript{37} \textit{Id.} at 44.

\textsuperscript{38} GORTEMAKER, supra note 25, at 36.

\textsuperscript{39} Escape to the West through Berlin was comparatively easy before 1961. People frequently crossed from East to West to visit family or to work on the other side. Occasionally, the visitors found it easy to stay. GELB, supra note 15, at 44.


\textsuperscript{41} The East German government tried to stem the flow of refugees by erecting barbed wire on the border. See supra note 36. However, by 1957, the loss of labor was so bad that the government both increased production demands on the remaining work force and added a new offense to its criminal code—leaving the country without authorization. GELB, supra note 15, at 44. Article 213 of the Penal Code of the G.D.R. states that "a person who . . . without government authority leaves or fails to return to the German Democratic Republic is liable to imprisonment of up to two years." GDR Penal Code, supra note 10, art. 213 (Unauthorized Frontier Crossing), at 76. Of course, the escapee would have to be caught, an event which rarely happened. GELB, supra note 15, at 44.

\textsuperscript{42} In 1961, when he supervised the construction of the Wall, Honecker was still acting under the then-Chairman of the Communist Party Walter Ulbricht. Honecker was simultaneously secretary of security for the Central Committee of the Communist Party, secretary of the National Defense Council, the organization which oversaw border security, and a full member of the Politburo. He became President of the G.D.R. upon Ulbricht's resignation in 1973. Obituary of Erich Honecker, DAILY TELEGRAPH, May 30, 1994, at 21.

\textsuperscript{43} The East Germans literally built the Wall overnight. German military police began to erect barbed wire and bricks at 1:00 a.m. on August 13, and completed the job in skeleton form by daybreak. For a very good account of the process, see GELB, supra note 15, at 148-65. The end result was a wall with guard towers, barbed wire fences, vehicle barricades, mines, and rifles set up automatically to shoot anyone trying illegally to cross the guarded area. Marjorie Miller, Former E. German Leaders Charged in Border Killings, L.A. TIMES, Jan. 10, 1995, at A4.
Wall was effective. As a result, the total number of refugees from the East dropped to under 5,000 per year. Of those, only a few dozen per year escaped directly across the border. In addition, the government managed to keep legal emigration to a relatively low, controlled number.

More significant is the number of people who were killed trying to escape from the G.D.R. During the twenty-eight years that the Wall sealed the border between East Germany and the rest of the world, almost 600 people, most of them East German, were killed trying to escape from the East to the West. They were either shot or killed by one of the other means at the guards' disposal.

Escape from the East was practically impossible. Guards patrolled the border twenty-four hours a day, with orders to shoot would-be escapees. Border guards underwent special training which encouraged them to shoot defectors. The official endorsement and encouragement of the shoot-to-kill policy has been a significant item of controversy at the trials.

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44. The Wall served its purpose. It kept G.D.R. citizens in the G.D.R., and the country became the highest producing communist country in the world. WALLACH & FRANÇISCO, supra note 40, at 28.
45. GORTEMAKER, supra note 25, at 36.
46. Id. at 36 n.12. Most of those who managed to leave the country did so by various means, such as not coming back from trips abroad, hiding in cars or on trains, and other means which did not directly challenge the border guards. Id.
47. Between 1962 and 1988, with a few exceptions, emigration from the G.D.R. hovered between 12,000 and 20,000 per year. In 1989, when the Berlin Wall was taken down, the number rose sharply to 348,854. WALLACH & FRANÇISCO, supra note 40, at 31 (Chart: Total Emigration from the GDR, 1962-1988).
48. See ATKINSON, supra note 6.

The leveled area [behind the Wall] is a desolate, dangerous no-man's land, patrolled by Kalashnikov-toting guards, dotted with free-fire machine-gun emplacements, and sown in places with landmines. It is punctuated with 285 elevated watchtowers . . . and by a series of dog runs where ferocious, long-leashed Alsatians effectively run free. It is not a safe place to be.

50. The area immediately on the Eastern side of the Wall had a number of booby traps designed to prevent anyone from even reaching the Wall. In addition to the guards, dogs, minefields and automatic guns, see supra note 49, there was the Wall itself. If one were able to reach the Wall safely, that person would still have enormous difficulty actually getting over due to the "thick, smooth-surfaced, ungrippable cement tubing affixed to its top to prevent people from doing just that." GELB, supra note 15, at 4-5. A number of people who made it past the life-threatening dangers to the Wall were stopped by the Wall itself. Id.
51. See infra note 134.
52. The guards went through a special training program, earned higher salaries than other soldiers of comparable rank, and were part of a system designed above all to encourage them to shoot defectors while maintaining secrecy about that policy. Fisher, supra note 49. Members of the Stasi, the secret police, also reportedly monitored guards' conversations with each other and threatened to throw guards in jail if they expressed reservations about shooting border-crossers. Id.
53. It is unclear whether there was an actual written order, or merely an understanding tantamount to a written document. See discussion infra Part III.
According to a statement provided by the German Ministry of Justice on November 30, 1990, at the beginning of the trial process, the government issued a warrant for Erich Honecker’s arrest after discovering “written orders by the former East German leader for guards at the Berlin wall to shoot to kill people who were seeking to flee the country.” One such order, dated May 3, 1974, was the product of a meeting of the East German National Defense Council (N.D.C.). At that meeting, President Honecker supposedly said, “Now as ever, firearms must be ruthlessly employed when attempts are made to cross the border, and those comrades who successfully use their weapons are to be praised.” More clear is that both before and after that order, Honecker and the N.D.C. ensured that the guns and mines employed on the border were continuously upgraded and kept in perfect working order.

2. Destruction

For twenty-eight years, the Berlin Wall was an impregnable symbol of the divide between East and West. The Wall made the separation, initially considered temporary, a permanent one. But in 1989 the Wall began to crack and, eventually, it crumbled. The beginning of the end of the Wall, and the G.D.R., occurred on May 2, 1989, when Hungary, which had its own Iron Curtain, opened its border to Austria. East Germans were already allowed to travel freely to Hungary. Now, for the first time in almost thirty years, they could also travel to the West. By September, over

55. Id. The National Defense Council was East Germany’s highest military body. It oversaw, among other things, the construction and maintenance of the East-West border. The Council consisted of the most senior leaders of East Germany, including former Party Chairman Honecker, former secret police chief Erich Mielke, former Prime Minister Willi Stoph, former Secretary of the National Defense Council Fritz Streletz, Hans Albrecht, and former Defense Minister Kessler. All except Honecker were arrested on May 21, 1991, to stand trial for what the Berlin Justice Minister called their “shared responsibility” for the “order to fire indiscriminately at those seeking to breach the border.” Tagliabue, supra note 4.
56. Tagliabue, supra note 54.
57. Throughout the duration of the Wall’s existence, 1961-1989, Honecker, former defense minister Heinz Kessler, and other members of the N.D.C., ordered constant improvements in the weaponry, shooting devices, and mines used to stop East Germans trying to escape to the West. Marc Fisher, Fallen Strongman in the Dock: Germany’s Trial of Aged, Still Defiant Honecker Raises Questions, Wash. Post, Dec. 1, 1992, at A28. In addition, the Government alleged that Honecker and his colleagues “routinely met to discuss ways to hinder escapes and their orders were that ‘the border must be made even harder to get through.’” Honecker Linked to Deaths of 49 who Fled, N.Y. Times, June 4, 1992, at A11.
58. Gortemaker, supra note 25, at 23.
59. McAdams, supra note 35, at 193. Hungary had maintained a barbed wire border between itself and Austria, similar to the intra-German border, complete with guard towers and automatic rifles. However, on May 2 Hungary announced that within a year it would completely dismantle its frontier barrier. Keithly, supra note 27, at 109.
60. Members of Warsaw Pact states, including East Germany, Hungary, Czechoslovakia, Bulgaria, Rumania, Poland and the Soviet Union, allowed travel among Warsaw Pact states. The Members only restricted travel to the West. See, e.g., Georg Brunner,
110,000 East Germans had fled to West Germany.\textsuperscript{61}

The first crack in the G.D.R.'s physical seal stemmed from outrage over the fraud surrounding the May 7, 1989, national election.\textsuperscript{62} The ruling Socialist Unity Party of Germany (\textit{Sozialistische Einheitspartei Deutschland}, or S.E.D.) had received 95.98\% of the vote.\textsuperscript{63} This was no surprise, since the S.E.D. usually won elections with 99\% of the vote.\textsuperscript{64} In fact, the S.E.D. had not lost an election since the first national election in 1950.\textsuperscript{65} Despite historic acceptance of this practice, in May, 1989, East Germans refused to accept the results of the election. They took to the streets, organizing there-tofore unheard-of monthly demonstrations demanding political reform.\textsuperscript{66}

The S.E.D. was facing growing domestic political opposition as well as an enormous refugee movement out of the country.\textsuperscript{67} Some people continued to leave through Hungary, and others began to demonstrate on a regular basis. Leipzig, a cultural and intellectual center in the eastern state of Saxony, became the meeting place for weekly demonstrations. The crowds grew in size from 5,000 on September 25, to 150,000 by October 16.\textsuperscript{68} People demonstrated for the right to leave, but also for the right to stay and be free.\textsuperscript{69}

The Honecker government could not stand before the popular onslaught. On October 18, Erich Honecker resigned as Chairman of the Central Committee of the S.E.D.\textsuperscript{70} and was replaced by Egon Krenz.\textsuperscript{71} The people received Krenz with skepticism and mistrust, viewing him as merely continuing Honecker's policies.\textsuperscript{72} The citizens of the G.D.R. continued to pressure the S.E.D. for reform.\textsuperscript{73} In the week following Krenz's ascendency, a demonstration in Leipzig drew a crowd of 250,000.\textsuperscript{74} On November 4, a rally in Berlin drew almost a million people.\textsuperscript{75} The people demanded free elections, free expression, and the resignation of the government.\textsuperscript{76} In response, on November 6, the Krenz government


\textsuperscript{61} \textsc{Gortemaker}, supra note 25, at 64.
\textsuperscript{62} \textit{Id.} at 59-60.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textsc{Turner}, supra note 12, at 100. At the polls, officials would present voters with a list of candidates, and give voters the choice to either approve or veto the list as a whole. By making the voting process all or nothing, the S.E.D. virtually guaranteed an almost-unanimous endorsement of the S.E.D. slate. \textit{Id.} People were not surprised that the S.E.D., as with the Communist party in the Soviet Union, regularly achieved 98\% voter turnouts, and 99\% endorsement of candidate lists. \textit{Id.}
\textsuperscript{66} \textsc{Gortemaker}, supra note 25, at 59-60.
\textsuperscript{67} \textit{Id.} at 70-71.
\textsuperscript{68} \textit{Id.} at 70.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textsc{Keithly}, supra note 27, at 163.
\textsuperscript{71} \textit{Id.} at 164.
\textsuperscript{72} \textit{Id.} at 163-64.
\textsuperscript{73} \textit{Id.} at 165.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 172.
\textsuperscript{76} \textit{Id.}
announced what were, at best, ambiguous new travel laws. It was not enough, and when 750,000 East Germans protested and threatened to strike, the government announced on November 9 what the people wanted to hear: citizens of the G.D.R. could travel freely to the West. In the days following the easing of travel restrictions, millions of East Germans traveled to West Germany. Most returned, their desire for change temporarily satisfied. However, the Leipzig demonstrations continued, and East Germans made new demands on the government. Now, they wanted nothing less than national reunification.

C. Post-Wall Germany—Reunification

The S.E.D. did not support reunification because it would have meant abandonment of the socialism for which the G.D.R. stood. In the end, it did not matter what the S.E.D. wanted. With the first free East German elections scheduled for March 18, 1990, politicians and activists formed over twenty-five political parties, all of which competed for seats in the East German parliament. The S.E.D., opposed to unification, won only sixteen percent of the vote. The Christian Democratic Union (C.D.U.), the Eastern counterpart of F.R.G. Chancellor Helmut Kohl's C.D.U. party, ran on a platform advocating reunification and won over forty percent of the vote. The C.D.U., recognizing its mandate to pursue reunification, eventually passed the necessary measures through the parliament.

Reunification needed the approval of both Germanies. Chancellor Helmut Kohl of the Federal Republic of Germany had been publicly committed to the idea of unity since December, 1989. The actual unification of the Germanies occurred on October 3, 1990, under the terms of the Treaty on German Unity. According to the Treaty, the G.D.R. "ceased to exist as a state in its own right," having entered into a union with the

77. McADAMS, supra note 35, at 198-99. Although seeming to grant the right to leave the country for 30 days each year, the new laws also contained numerous qualifications, all of which made the law ambiguous at best, and restrictive at worst. Id.
78. Id. at 199.
79. Id.
80. Id.
81. Id.
82. Id. at 200.
83. WALLACH & FRANCISCO, supra note 40, at 56-57 (table listing parties and representation achieved).
84. Id. at 53.
85. Id. at 56 (table). The S.E.D. was also known as S.E.D.-PDS. PDS stood for Party of Democratic Socialism.
86. Id. at 53.
87. Id. at 56 (table).
88. Id. at 58-59.
89. GORTENMAKER, supra note 25, at 129.
90. Id.
92. Id. at Introductory Note.
The Basic Law, drafted in 1949, stated one of its primary goals in the Preamble: "The entire German people is called upon to accomplish, by free self-determination, the unity and freedom of Germany." The Basic Law applied initially only to West Germany, although the Preamble stated that in drafting the law West Germany "acted also on behalf of those Germans to whom participation was denied." In the event that the goal of reunification was reached, Article 23 of the Basic Law stated that the Basic Law would then be "put into force for other parts of Germany on their accession." In other words, former West German law would govern unified Germany.

II. Current Situation—The Trials

A. The Proceedings

After reunification, there was a public outcry to bring to justice those who were responsible for crimes that occurred under the G.D.R. communist regime. The unified German government responded with measures previously unheard of in East Germany. In June, 1991, the Berlin prosecutor's office indicted four former border guards who were responsible for shooting the last attempted escapees over the Wall. That attempt had been made in February, 1989, months before the G.D.R. opened the border.

Over fifty guards have been indicted and tried for murder or manslaughter in courts in and around Berlin in forty subsequent arrests and trials. An express provision of the Treaty on German Unity provided that the "[l]aw of the German Democratic Republic valid at the time of signing of this Treaty . . . shall remain in force in so far as it is compatible with the Basic Law." As a result, the guards have been indicted under the Basic Law, reprinted as The Bonn Constitution: Basic Law for the Federal Republic of Germany (1949). There were arguments made for and against unification in this manner. The other option was to discard the Basic Law and the G.D.R. Constitution and to draft a new constitution. In the end, both countries found it best for the G.D.R. to come under the umbrella of the Basic Law, a document that had already been proven.

93. Grundgesetz [Constitution] (F.R.G.) (reprinted as The Bonn Constitution: Basic Law for the Federal Republic of Germany (1949)). There were arguments made for and against unification in this manner. The other option was to discard the Basic Law and the G.D.R. Constitution and to draft a new constitution. In the end, both countries found it best for the G.D.R. to come under the umbrella of the Basic Law, a document that had already been proven. Gortemaker, supra note 25, at 200-02.

94. America, Britain, and France drafted the Basic Law, which was then submitted to the 11 West German state parliaments for approval. When it passed, on May 24, 1949, the Federal Republic of Germany became an official country. Turner, supra note 12, at 36.

95. Grundgesetz, supra note 93, pmbl.
96. Id.
97. Id. art. 23.
99. Tagliabue, supra note 3.
100. Id.
103. Treaty on German Unity, supra note 91, art. 9. See discussion infra Part V.B.1.
former East German law, although the trials have been conducted using West German courtroom rules.\textsuperscript{104}

An initial problem, quickly dismissed, was the fact that the judges who tried the first cases were all from the West.\textsuperscript{105} East German judges initially were not able to conduct trials in unified Germany. Because West German law was to govern the new state,\textsuperscript{106} East German judges who remained in service had to undergo retraining in West German law, a process which took months.\textsuperscript{107} The guards’ defense attorney in the first trial objected to West German judges trying the cases against the border guards.\textsuperscript{108} However, the court overruled the objection.\textsuperscript{109}

The Berlin Prosecutor has also indicted most of the surviving major political figures who were involved with the construction and maintenance of the sealed border between East and West. There have been four sets of high-level indictments. First, in May 1991 the state indicted Erich Honecker\textsuperscript{110} and five of his colleagues from the National Defense Coun-

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\textsuperscript{104} Tyler Marshall, Pitfalls in the Pursuit of Justice; The Case Against Four Former East German Border Guards is Trying the Nation’s Legal System. Should a Democracy Judge Events That Occurred Under Communist Rule?, L.A. Times, Jan. 13, 1992, at A1, A11. During Germany’s existence as separate states, West German law did not apply to East Germany. Likewise, after reunification, West German law cannot be retroactively applied to alleged crimes that occurred in East Germany. Germany; Punishment or Pardon?, The Economist, Oct. 16, 1993, at 52, 57. Therefore, the trials are being conducted under East German law. Although judges have not admitted that East German law would absolve the guards from all responsibility, it is arguable that shooting escaping defectors was legal in the G.D.R. \textit{Id.} See discussion infra Part III. Indeed, that is a fundamental premise of this Note.


\textsuperscript{106} \textit{Id.} See supra note 93 and accompanying discussion.

\textsuperscript{107} McElvoy, \textit{supra} note 105. The first step in the process of reforming the judiciary was to investigate all former East German judges and evaluate the extent of official corruption, connections with the Communist party, and connections with the secret police (Stasi). Daniel J. Meador, Transition in the German Legal Order: East Back to West, 1990-1991, XV B.C. Int'l. & Comp. L. Rev. 283, 297 (1992). The investigations were to determine whether the judge “has engaged in activity in the GDR that raises serious questions about his fitness to serve in a democratic legal order, in a regime of government under law.” \textit{Id.} If judges seemed to have given overly harsh sentences in what appeared to be purely political cases, they were disqualified. \textit{Id.} Likewise, involvement with the Stasi was grounds for dismissal. \textit{Id.} G.D.R. judges who passed evaluation were allowed to continue to serve in their official capacities, and were required to attend courses in F.R.G. law, which they are now required to apply. \textit{Id.} at 299.

\textsuperscript{108} McElvoy, \textit{supra} note 105.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} The government issued a warrant for Honecker’s arrest, in December 1990, just after reunification. Tagliabue, \textit{supra} note 3. However, Honecker left Germany in March 1991 for Moscow and took refuge in the Chilean embassy in December 1995. Honecker Linked to Deaths of 49 who Fleed, N.Y. Times, June 4, 1992, at A11. The government originally charged Honecker with responsibility for four deaths. In May 1992 that number was revised upward to 49. \textit{Id.} In July 1992 Chile returned Honecker to Germany, where he faced charges of giving orders to shoot defectors. Honecker is Jailed for “Wall” Deaths, Cmt. Tues., July 30, 1992, at 3. However, Honecker’s trial was cut short in January 1993, due to his diagnosis with terminal liver cancer. He immediately flew to Chile to join his already-exiled wife and daughter. Marc Fisher, Honecker Freed by Germany, Flies to Chile, Wash. Post, Jan. 14, 1993, at A26. Erich Honecker died in Chile in
Second, in January 1995 the state indicted Egon Krenz, Honecker's successor to the presidency of the S.E.D., and six of his Politburo colleagues. Next, eight former East German generals were accused of manslaughter and went on trial in Berlin in August 1995. Finally, the trial of six other former generals began in October, 1995.

On behalf of the border guards, former Defense Minister Kessler of the National Defense Council denied that killing East German defectors was official policy. Although he said that he "regretted any 'unnatural' deaths that occurred," he also "insisted there were no high-level orders to kill people trying to escape East Germany." This argument is not believable. If there were no orders, the implication would be that the border guards were


111. Robin Gedye, Illness Forces Delay in Honecher's Trial, DAILY TELEGRAPH, Nov. 13, 1992, International, at 17. See also supra note 55. When Honecker's trial began, six former Politburo members were on trial. See supra note 110. Former Party Chairman Honecker was eventually judged too ill to stand trial, and was allowed to rejoin his wife and daughter in Chile, where he died in May, 1994, of liver cancer. See Obituary of Erich Honecher, supra note 42. Adrian Bridge, Three East German Ministers Jailed Over Wall Deaths, THE INDEPENDENT, Sept. 17, 1993, at 12. Former state security bureau (Stasi) chief Mielke and former Prime Minister Stoph were also judged too ill to stand trial. Id. Of the remaining three members of the National Defense Council, former Defense Minister Kessler was sentenced to seven-and-a-half years in jail, Deputy Defense Minister Streletz to five-and-a-half years, and district Communist Party boss Albrecht to four-and-a-half years. Id. However, Kessler, Streletz, and Albrecht were freed to appeal their sentences. Miller, supra note 43.


113. Krenz, who ascended to power on October 18, 1989, after Honecker resigned, remained in office just six weeks. On December 3, 1989, popular discontent forced Krenz to step down. Miller, supra note 43. See also Crawshaw, supra note 112.

114. Gedye, supra note 101. The eight generals were members of the Defense Ministry's committee on long range planning, and were accused of formulating the instructions to the border guards to kill escaping East Germans. Id.

115. Kerstin Rebien, East German Generals on Trial for Border Killings, REUTERS NORTH AMERICAN WIRE, Oct. 27, 1995, available in LEXIS, News Library, Reuna File. The defendants, who were accused of playing a key role in securing and reinforcing the automatic and deadly devices which protected the East-West border, consisted of former deputy defense minister Klaus-Dieter Baumgarten, the general in charge of border security, and four subordinate generals. Id. In September, 1996, these six generals all received sentences of more than three years, with Baumgarten receiving a six-and-one-half-year term. Mary Williams Walsh, Ex-Generals Get Prison in Germany, L.A. TIMES, Sept. 11, 1996, at A11.

116. Shoot-to-Kill Policy is Denied, COURIER-JOURNAL, Dec. 8, 1992, at 4A. It is entirely likely that former Defense Minister Kessler is correct, that there were, in fact, no written orders. One of the problems the government has faced is its inability to produce a written document for submission as evidence. Anne McElvoy, Germany Puts Itself on Trial, THE TIMES, July 31, 1992, at B12. However, the government asserts that since soldiers had orders which they were required to obey, the case does not depend on the existence of actual written orders. Id. Rather, the government asserts that after the National Defense Council meeting of 1974, which "formalise[d] the niceties of incarceration and issued a statement declaring 'Now as before for attempts to break through the border, there must be ruthless use of firearms,' everyone from the unit commander to the 19-year-old wielding a gun in the spotlight knew what it meant." Id.
acting on their own when they shot escaping citizens, thus taking the law into their own hands. Given the guards' upbringing in the G.D.R., a state subject to an intense rule of law, and their training in military discipline, independent action of such magnitude seems unlikely. Indeed, their border guard training demanded that they exercise no such independent thought; rather, it demanded that they do what they were told. In this case, they had been told to shoot.

In accordance with the existence of shoot-to-kill orders, the standard defense argument at each trial has been that the border guards, in shooting escaping citizens, were acting under color of law. Although the prosecution may not be able to find a copy of an explicit order to shoot citizens attempting to escape over the border, Honecker himself has referred to his having "issued or approved such an order." Before returning to Berlin in 1992, Honecker declared from Moscow, "I consider it a scandal that the border guards should be imprisoned when they have done nothing other than carry out their duty in accordance with their oath of loyalty." Furthermore, even if there was no express written order, the border guards thought there was, and they have been supported by their superiors. Some of the superiors have tried to take responsibility for the shootings, stating that the guards were merely following orders.

117. One of the soldiers at the first trial testified: "We were soldiers—conscripts—who had to obey orders or face military prison." Tamara Jones, *E. German Guards on Trial: Can Justice Scale the Wall?,* L.A. Times, Sept. 17, 1991, at A1.

118. Id.

119. See supra note 7.

120. In his opening statement at the first border guard trial in September 1991, Rolf Bossi, lead defense counsel, argued that "the trial should be immediately terminated because such shootings were legal under the former East German law. 'The East German citizen had no right to freely exit the country,' he told the court." Marshall, supra note 98.

121. Stephen Kinzer, *Senior East Germans Go on Trial; Critics Ask if Such a Case Is Just,* N.Y. Times, Nov. 13, 1992, at A8. At one point in the trial against Honecker, the trial judge paused to read some other examples of high-level statements which, if not technically orders to shoot, could be understood as nothing else. The judge read:

A 1958 border guards' manual: Guards must chase down fleeing countrymen. "Shoot them if necessary," it says. A 1961 report by Mr. Honecker: One man was shot as he tried to swim to West Berlin. He sank, Mr. Honecker reported, but happily no bullets hit Western territory. A 1962 note from the National Defense Council: Some soldiers were not convinced that their fleeing countrymen were "opponents who needed to be arrested or eradicated . . . there is too little well-aimed use of weapons in these cases." A 1969 note to Politburo members: "Against border violators and criminals, weapons are to be used."

George Rodrigue, *Called to Account; Ethical Issues Complicate Ex-E. German Leader's Trial for Acts of Toppled Regime, Dallas Morning News,* Dec. 14, 1992, at 1A.


123. See discussion supra note 116.

124. Francine S. Kiefer, *Germany Puts Eastern Guards on Trial for Border Shootings, Christian Sci. Monitor,* Sept. 4, 1991, at 4. In a letter to Parliament in 1991, four former East German generals accepted responsibility for the shootings and said that blame did not lie with the lower-level guards, as they were just following orders. Id.
Indeed, whether there were orders or not may not matter. At the first border guard trial, the judge asserted that, regardless of orders, the border guards nevertheless had an obligation not to shoot, stating that although shooting to kill was technically legal under East German law, it infringed on “basic human rights” and a higher moral law. Later, at the second trial, the trial judge said that regardless of the shoot-to-kill orders at the border, guards did not have to kill lone, unarmed escapers. Instead, they should have “aimed at [defectors’] feet.” The German government, for its part, has argued at the border guard trials that the secret shoot-to-kill orders violated international law, which East Germany had accepted.

Despite the initial negative judicial reaction against the accused guards in the first two trials, the courts were initially largely unwilling to accept the government’s claims. As a whole, the trials have resulted in few prison sentences and many suspended sentences and acquittals. For example, in six consecutive cases in 1994 and 1995, only one guard was actually sentenced to time in prison, while seven others were allowed to go free, either on probation or with suspended sentences or acquittals.

125. Stephen Kinzer, Two East German Guards Convicted of Killing Man as He Fled to West, N.Y. TIMES, Jan. 21, 1992, at A1. The judge stated that “[a]t the end of the twentieth century, no one has the right to ignore his conscience when it comes to killing people on behalf of the power structure.”
127. Id.
128. Id.
129. Charles A. Radin, East German Border Guard is Jailed; 3 Others are Freed in Wall Shooting, BOSTON GLOBE, Jan. 21, 1992, at 1 (“A principal assertion of the prosecution was that the secret shoot-to-kill orders were in violation of the Helsinki Accords and Geneva Convention, both of which East Germany accepted.”). See infra Part IV.
130. See, e.g., Rick Atkinson, Three Ex-East German Officials Sentenced; Former Top Communists Found Guilty in Deaths of Refugees, WASH. POST, Sept. 17, 1993, at A34 (reporting that, as of then, two guards had been convicted, nine had received suspended sentences, and 13 had been acquitted). Since 1993, although the exact count is unclear, acquittals and suspended sentences have continued to far outpace convictions. See infra note 131.
131. In one border guard trial, the defendants were convicted of attempted murder, but were given 15 months’ probation. Court Convicts Former East German Border Guards, REUTERS NORTH AMERICAN WIRE, Aug. 23, 1994, available in LEXIS, News Library, Tnmws File. In the next trial, a former guard was given one year’s probation. Former East German Border Guard Convicted in 1956 Shooting, DEUTSCHE PRESSE-AGENTUR, Nov. 29, 1994, available in LEXIS, News Library, DPA File. Then, a former guard received an 18-month suspended sentence, despite killing a defector and wounding the defector’s fiancee. Ex-E. German Guard Free After Shootings 30 Yrs Ago, REUTERS NORTH AMERICAN WIRE, Dec. 22, 1994, available in LEXIS, News Library, Tnmws File. In the next trial, a former guard was acquitted of manslaughter, despite killing a cyclist riding back into the G.D.R. The judge acquitted him because it was unclear that the killing was intentional. East German Border Guard Acquitted in Shooting, REUTERS WORLD SERVICE, Jan. 25, 1995, available in LEXIS, News Library, Tnmws File.

The next trial resulted in one of the few recent convictions. The judge sentenced a former officer to three years in prison for shooting a defector who was entangled in barbed wire and had already surrendered. East German Guard Jailed for 1956 Border Shooting, REUTERS WORLD SERVICE, Feb. 1, 1995, available in LEXIS, News Library, Tnmws File. In a subsequent trial, the judge reverted to the pattern of the other trials.
However, the Supreme Court's November 1996 decision that the border guard trials are constitutional will make future prosecutions more likely to result in convictions. This increased likelihood extends to both border guards and higher officials.

B. Uniqueness of the Trials

One misconception which should be disposed of immediately concerns the primary border guard defense. Defense counsel at trials of both officials and border guards have claimed that the government gave, and the guards followed, orders which were legal at the time. Critics suggest that this defense is similar to the defense dismissed at the Nuremberg trials of Nazi war criminals after World War II. During those trials, numerous defendants claimed that they were "just following orders" when they shot, tortured, and executed millions of innocents. That defense was disregarded under the principle that all individuals have an obligation to disobey orders which are clearly illegal. Nazis who attempted to claim their innocence because they were just following the orders of their superiors.

Two former guards were cleared of lower court convictions, which had resulted only in one-year suspended sentences. Court Acquits East German Guard for Shots at Wall, Reuters World Service, Feb. 10, 1995, available in LEXIS, News Library, Ttxtws File. In a later trial, two former guards and their company commander were given suspended one-year sentences. East German Guards Get Probation for Wall Shooting, Reuters World Service, Feb. 24, 1995, available in LEXIS, News Library, Ttxtws File. In that case, the judge said that the lenient decision stemmed from the problem of reconstructing events from thirty years ago. Id.

132. Sentences Upheld for East Germans in Escape Deaths, Chi. Trib., Nov. 13, 1996, News, at 13. Heinz Kessler, Fritz Strelitz and Hans Albrecht appealed their convictions to the Supreme Court after their sentence in 1993. See supra note 111. They were not alone in appealing an adverse decision to the highest court. In a separate action, Klaus-Dieter Baumgarten appealed his six-and-one-half-year sentence of September 1996. In November 1996, the Supreme Court ruled that East German leaders' orders to shoot to kill violated international human rights laws and that border guards and those giving the orders could legally be brought to trial. Former E. German Border Guards Chief Arrested After Court Ruling, Agence France Presse, Nov. 13, 1996, available in LEXIS, News Library, AFP File; Sentences Upheld for East Germans in Escape Deaths, supra.

133. Erik Kirschbaum, Krenz Slams German Court on Berlin Wall Killings, Reuters North American Wire, Nov. 13, 1996, available in LEXIS, News Library, Ttxtws File (citing Egon Krenz's acknowledgement that he is now more likely to be sentenced to prison, in the wake of the Supreme Court's upholding sentences for former East German leaders for ordering border guards to shoot to kill fleeing refugees). Although the indictment against Krenz originally included six others, one, former union boss Harry Tisch, has since died. Hans-Juergen Moritz, Justice Struggles to Deal with East German Leaders, Reuters World Service, Aug. 2, 1995, available in LEXIS, News Library, Ttxtws File.

134. See, e.g., Ex-Border Guards on Trial in Berlin, Chi. Trib., Sept. 3, 1991, at 8 (citing argument that East German law outlawed escape from the G.D.R., and that East German leadership issued orders to enforce the law. As one border guard's attorney stated, "[s]oldiers of the National People's Army were simply fulfilling their duty to enforce the law at the time."); Atkinson, supra note 112.


The impact of the Nuremberg trials was to put the onus on the individual soldier to ask himself whether the activity he was being ordered to perform was legal or illegal. If it was the latter, the order itself is an illegal one, and he is not obligated to perform it.
were found guilty of crimes against peace, war crimes, and crimes against humanity on an individual basis.\textsuperscript{136}

The trials of the border guards, although superficially resembling the Nuremberg trials, in fact have little in common with that tribunal. Indeed, "[t]here are . . . dramatic and troubling differences between the proceedings in Nuremberg and those in [border guard trial] Judge Seidel's courtroom."\textsuperscript{137} Regarding the accused, the Nuremberg trials involved many top officials of the Nazi government and military who exercised a good deal of power.\textsuperscript{138} In contrast, the Berlin trials involve largely "junior functionaries."\textsuperscript{139} In addition, the alleged crime is different. Inhumane though both crimes may be, genocide is not the same as legal killing.\textsuperscript{140} While the Nazis "were charged with genocide of unprecedented barbarity; [the border

\textsuperscript{136} The International Military Tribunal which conducted the Nuremberg trials imposed individual liability for violations of crimes within the jurisdiction of the International Military Tribunal. Charter of the International Military Tribunal, in 1 Nazi CONSPIRACY AND AGGRESSION 4, 5 (1946) [hereinafter Nuremberg Proceedings]. Since individuals were liable, it was irrelevant whether they were following orders.

The Tribunal determined that three crimes fell under its jurisdiction:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation, or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.


\textsuperscript{138} The preface to the indictment and trial documents involved in the trials, approved by Robert H. Jackson, Chief of Counsel for the United States at Nuremberg, refers to those on trial as "major Nazi war criminals." Nuremberg Proceedings, supra note 136, at v. The indictment itself listed the individuals being charged and the organizations to which they belonged. It is immediately clear that they were more than just border guards. The 22 accused belonged to such organs of government as the Cabinet, the Leadership Corps of the Nazi party, the Gestapo (secret police), and the general staff and High Command of the German armed forces, to name a few. \textit{id.}

\textsuperscript{139} Margolick, supra note 137. Telford Taylor, counsel for the United States at Nuremberg, has referred to the border guards as "nincompoops," by comparison. \textit{id.}

\textsuperscript{140} The Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention], to which the G.D.R. and the F.R.G. were signatories, defines genocide to mean:

[\textsuperscript{A}ny of the following acts committed with intent to destroy, in whole or in part, a national ethical, racial or religious group, as such:

a. Killing members of the group;

b. Causing serious bodily or mental harm to members of the group;]
guards] killed those deemed by their laws to be fleeing felons—just as police everywhere have done since the invention of firearms.141 In other words, the border guards were doing their duty to enforce the laws and protect the integrity of their state. They did not mount an aggressive attack to eradicate whole populations, as the Nazis did. Rather, they were acting as they thought necessary to protect the border from people who were on notice as to the consequences of an escape attempt.142 Lastly, the East German Communist regime was not comparable in nature to that of the Nazis.143

Thus, it is not immediately clear that the border guards cannot assert the defense denied the Nazis; it is not clear that a defense of "just following the N.D.C. orders" is invalid. Although that defense was rejected at Nuremberg, the circumstances of Communist East Germany are very different from those of Nazi Germany. Indeed, German courts have implicitly held that the situations are different. German courts have, in most cases, either acquitted or given suspended sentences to indicted border guards, on the grounds that they were following legal orders.144

III. East German Law

The universal principle that came from the Nuremberg trials is that carrying out an illegal order of a superior does not excuse the commission of an illegal act.145 The legality of the order is one way in which the border guard cases differ from those arising out of Nazi Germany. Genocide was clearly illegal under international law.146 In contrast, protecting the East German border was legal under East German law and may have been legal under international law, as well.

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c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; . . . .
141. Margolick, supra note 137.
142. It was not a secret, nor did the East German government try to keep secret, what would happen to those caught attempting illegally to cross the border. However, some seemed to take the threat more lightly than others. For example, one attempted escapee, who testified against the guards in the first trial in 1991, stated that he knew of the risk, but did not think that guards would shoot to kill. Jonathan Kaufman, Trying a Reluctant Shooter; German Guard Faces Charges in Escapee's Death, BOSTON GLOBE, Sept. 17, 1991, at 2.
143. As Heinz Gilinsky, the former director of the Council of Jews in Germany, has been quoted as saying, "We have accused the S.E.D. [Communist] regime and its policies of suppression, but by all means I will not agree to a comparison of crimes committed by the Nazis—which have been unique in human history—with other crimes, to put them in any type of relation." Horst Gemmer, Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union, 12 B.C. THIRD WORLD L.J. 241, 251.
144. East German Guards Get Probation for Wall Shooting, supra note 131.
146. See Genocide Convention, supra note 140.
A. The Constitution of the G.D.R.

Protecting the sovereignty of the G.D.R. was a fundamental element of the G.D.R. Constitution. Article 90 of the Constitution stated:

(1) The administration of justice serves to implement socialist legality, protect and develop the German Democratic Republic and its state and social order. It protects freedom, peaceful life and the rights and dignity of man.

(2) It is the joint concern of socialist society, its state and all citizens to combat and prevent crime and other violations of law.\(^{147}\)

Protecting the "state and social order" was of paramount importance, as seen further in Article 3(2), which established the principle of having one political alliance as the key to the G.D.R.'s success.\(^{148}\) In so doing, Article 3(2) emphasized that it "thereby implement[ed] the mutual relationship of all citizens in socialist society on the principle that each bears responsibility for the whole."\(^{149}\) If each citizen bore responsibility for the whole, it would stand to reason that any person who left the society committed an affront to that whole.

The Constitution suggested that the protection of socialist society was a legitimate concern.\(^{150}\) Former Defense Minister Heinz Kessler claimed in court that this, in fact, was part of the motivation for the shoot-to-kill policy.\(^{151}\) Former President Honecker, before the same court earlier that week, stated that he was concerned only with the health and safety of the state.\(^{152}\) Without the Berlin Wall and the strict enforcement that accompanied it, claimed Honecker, Germany would never have reunified, the Cold War would never have ended, and the world would have been at risk of a third world war.\(^{153}\) When he acted to reduce the tide of emigrees, Honecker claimed that he was thinking only of the well-being of the G.D.R. He told the court, "I lived for the German Democratic Republic."\(^{154}\)

Consistent with Kessler's concern with preventing acts with "bad consequences" and with Honecker's desire to protect the integrity of the Socialist state, border guards were led to believe that border crossings were a constant and dangerous threat.\(^{155}\) Guards were therefore constantly

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147. VERFASSUNG, supra note 27, arts. 90(1) and 90(2).
148. Id. art. 3(2).
149. Id.
150. See supra note 148 and accompanying text.
151. Rodrigue, supra note 121. Kessler is quoted as saying that he thought it was important to maintain tight security on the border "so that fewer people would do things that could have bad consequences." Id.
152. Honecker Defends Berlin Wall, Chi. Trib., Dec. 4, 1992, at 10. Honecker claimed that if he had not built the wall to stop the flood of escapes to the West, the Soviet Union would have intervened militarily as it did in Hungary in 1956 and in Czechoslovakia in 1968. Id.
153. Id.
155. Lutz Rathenow, a former border guard, wrote in the Berliner Zeitung that guards were constantly fed information and rumors that well-armed groups were planning to crash the frontier and would not hesitate to kill any soldier
watchful for an attack either on the border or on themselves. If attacked, they were ready to defend the border or themselves with deadly force.156 And although one could argue that an escaping citizen did not pose a threat to the Socialist state that required preventing such threat with deadly force, the G.D.R. Penal Code provided another justification.

B. The Penal Code of the G.D.R.

While the G.D.R. Constitution provided the general legal backdrop for armed border protection, the G.D.R. Penal Code addressed such protection more directly. The Penal Code had two distinct goals in this regard. The first was specifically to stop illegal attempts to cross the border. The second was generally to prevent crimes against the sovereignty of the G.D.R.

1. Attempts to Cross the Border

Article 213 of the Penal Code specifically prohibited unauthorized border crossings, both into and out of the G.D.R. It stated: “[a] person who . . . without government authority leaves or fails to return to the German Democratic Republic is liable to imprisonment of up to two years. . . . In serious cases, the offender is liable to imprisonment of from one to five years.”157 While seemingly inconsistent with the relatively moderate penalties of Article 213, the National Defense Council’s orders to shoot defectors were not inconsistent with G.D.R. law. The border guards were already legally allowed to stop escape from East Germany by any means necessary.

Although Article 112 prohibited murder,158 and Article 213 provided only a maximum of five years in prison for an escape attempt, Article 18 gave border guards the freedom to violate both Article 112 and 213. Article 18 stated:

Criminal responsibility is reduced if the person who acts, as a result of a presently threatening danger, which cannot otherwise be averted, to the life or health of himself or another person, has, without his fault, been placed into a state of great emotion or great distress and tried to avert this threat by an attack on the life or health of other people.159

The law would absolve a border guard of all criminal liability if he was in a state of emotional distress. Indeed, Reiner Oschmann, a former border guard, stated:

who tried to stop them. “It was a classic Western situation, either them or us,” he wrote. “In other words, they tried to keep us constantly ready to kill.”


156. Id.

157. GDR Penal Code, supra note 10, art. 213. Serious offenses included damaging border installations, falsifying papers, attempting to cross the border in groups, or repeated attempts to illegally cross the border. Id.

158. As noted supra note 10, anyone who deliberately killed another person risked imprisonment for ten years to life imprisonment. GDR Penal Code, supra note 10, arts. 112(1), 112(2(1)) (Murder).

159. GDR Penal Code, supra note 10, art. 18(1) (State of Distress and Coercion).
The so-called "protection of the frontier" always contained an element of emergency. We were defending the line against West Germany, always presented to us as the main culprit, the "imperialist enemy," ready and willing to destabilise the socialist system in East Germany at any minute. As such, we lived under constant stress.160 That the East German government never brought charges against the border guards indicates that the government did not consider their actions to be wrong.

2. Crimes Against the Sovereignty of the G.D.R.

At the first border guard trial, a former guard said, "[A]t that time, I was following the laws and commands of the German Democratic Republic."161 The guards had been given orders which they believed were legal and therefore had to be followed.162 It was especially important to fulfill the order to shoot because an illegal border crossing was seen as "maligning the sovereignty of the GDR."163 Since the Penal Code defined unlawful frontier crossing as a criminal act, the border guards, as members of the socialist society, had a duty to prevent any such attempt.164 As the Penal Code stated:

The relentless punishment of crimes against the sovereignty of the German Democratic Republic . . . is an indispensable previous condition for a stable peace order in the world and for the restoration of the belief in basic human rights, the dignity and value of man and for the preservation of the rights of each individual person.165

This vaguely worded section was broadly construed. "The relentless punishment of crimes against the sovereignty of the G.D.R." was of paramount importance, and was construed in conjunction with the Penal Code's treatment of murder. Although Article 112 of the Penal Code prohibited murder,166 murder by the state was legitimate. Article 112 specifically permitted the state to impose the death penalty if an act either constituted a crime against the sovereignty of the G.D.R., or was committed out of an attitude of hostility against the G.D.R.167 The exact language was a broad mandate for "relentless punishment" against such crimes. The border guards were protecting the state.168 Thus, the prohibition against mur-

161. Kinzer, supra note 125 (quoting Ingo Heinrich, defendant border guard at the first trial, convicted of manslaughter and sentenced to three and a half years in prison).
162. See discussion of East German National Defense Council, supra note 55 and accompanying text.
163. Id.
164. Adams, supra note 155, at 291.
165. GDR Penal Code, supra note 10, Special Part, First Chapter (Crimes Against the Sovereignty of the German Democratic Republic, Peace, Humanity and Human Rights).
166. See supra note 158.
167. Id.
168. Rolf Bossi, the defense attorney for the border guards in a 1991 trial, argued that there should be no trial, because the guards were simply fulfilling their orders and their duty to the state. Marshall, supra note 98; Guards go on Trial, THE FINANCIAL POST, Sept.
Consistent with Article 112's concern with sovereignty, Article 18 stated:

Anyone infringing rights or interests of other persons with a view to averting present threats, which cannot be averted in any other way, to himself, another person or the Socialist state and social order does not commit an offence as long as his act is commensurate with the nature and extent of the danger.170

A guard would not be convicted if he believed that a threat to either himself or the state could be prevented only by using deadly force. Further, Article 17(1) stated, "A person who wards off a present illegal attack against . . . the Socialist state and social order in a manner commensurate with the nature of the attack, acts in the interest of Socialist society and its legality, and thus does not commit any punishable act." Article 17(2) also excused any illegal action in the case of extenuating circumstances.172 A border guard could therefore argue under G.D.R. law that "even if shooting at escapees was an excessive response, a court should forego punishment because of the high emotional state a border guard maintained as a result of his indoctrination."173

Oschmann, the former border guard, related the emotional state of the border guards. Oschmann stated: "The psychological pressure was immense. And nobody who has not experienced it at first hand can really appreciate what it was like. [Guards carried out their orders to shoot because they were] terrified of the possible punishment."174 Even if a border guard thought it was wrong to shoot, he would have felt forced to do so, rather than face arrest, humiliation, and demotion.175

In addition to the
consequences for failing one's duty at the border, the command level officers set up a reward system for guards who successfully stopped a fleeing East German. Although the rewards varied, a guard who performed his duty could expect a commendation, a small party, a cash bonus, or some extra vacation time.\textsuperscript{176}

IV. International Law in East Germany

If the border guards did not violate East German law,\textsuperscript{177} the question then becomes whether East German law violated international law and whether following East German law was a transgression thereof. The government's argument has centered on the fact that East Germany violated international law from the beginning. Indeed, the charges "hinge[d] to a large extent on the ability to prove East Germany's adherence to international law . . . which made the shooting orders illegal."\textsuperscript{178} However, it is unclear that the orders to shoot escaping citizens actually violated international law.

A. International Criminal Law

East Germany's commitment to obey international law was manifested in its Constitution. Article 8(1) of the G.D.R. Constitution stated that "[t]he generally accepted rules of international law serving peace and peaceful international cooperation are binding upon the state and every citizen."\textsuperscript{179} Further, Article 91 stated that "[t]he generally accepted norms of international law relating to the punishment of crimes against peace and humanity and of war crimes are directly valid law."\textsuperscript{180}

The government of the G.D.R. was conscientious about adopting into domestic law most fundamental elements of international criminal law. Pursuant to the express constitutional commitment to international law, the East German Penal Code contained sections concerning international crimes.\textsuperscript{181} For example, Article 85 of the Penal Code outlawed planning and waging war;\textsuperscript{182} Article 86 prohibited aggressive acts;\textsuperscript{183} Article 88 pro-

\textsuperscript{176} Although accounts vary, it is reported that shortly after the shooting that led to the first border guard trial, the four guards on duty and responsible for the shootings were given commendations, a few days extra vacation, about 100 Marks, and a special buffet dinner. See, e.g., Kiefer, \textit{supra} note 124; Tagliabue, \textit{supra} note 3.

\textsuperscript{177} See discussion \textit{supra} Part III.

\textsuperscript{178} Marshall, \textit{supra} note 104.

\textsuperscript{179} \textit{VERFASSUNG}, \textit{supra} note 27, art. 8(1).

\textsuperscript{180} Id. art. 91.

\textsuperscript{181} GDR Penal Code, \textit{supra} note 10, Special Part, First Chapter (Crimes Against the Sovereignty of the German Democratic Republic, Peace, Humanity and Human Rights).

\textsuperscript{182} "A person who collaborates, in a responsible State, political, military or economic function in the threatening, plotting, preparation or waging of a war of aggression is liable to prison not below ten years, life imprisonment or the death penalty." \textit{Id.} art. 85 (Planning and Waging of Aggressive Wars).

\textsuperscript{183} "A person who undertakes to carry out an aggressive act against the territorial integrity or political independence of the German Democratic Republic or any other state . . . is liable to imprisonment of not less than three years . . . . In particular serious cases imprisonment for life or the death penalty may be imposed." \textit{Id.} art. 86 (Preparation and Carrying out of Aggressive Acts).
hibited oppression;¹⁸⁴ Article 91 banned crimes against humanity;¹⁸⁵ and Article 93 outlawed war crimes.¹⁸⁶

All of the crimes prohibited by the Penal Code are generally accepted as international crimes. Although there is some controversy as to what constitutes an international crime, there is also some agreement.¹⁸⁷ One definition of international crimes includes unlawful use of weapons, crimes against humanity, genocide, torture, and the taking of civilian hostages.¹⁸⁸ Another view is that international crimes include piracy, slave trade, war crimes, genocide, official torture, and racism.¹⁸⁹ Although catalogues of international crimes range from the general to the specific, even a "more specific and controversial list of international crimes does not include the shooting of a state's own nationals as they attempt to illegally cross the border."¹⁹⁰ Stated another way, although shooting a person trying to cross a border "denies an individual the internationally recognized human right to emigrate or to travel freely abroad, it is apparently not an international crime."¹⁹¹ Traditional categories of international crime include neither the border guards' direct actions nor their orders from above.

If shooting escapees is not an international crime, then the G.D.R. Penal Code did not fall short in failing to include such a provision, and the sum total of the Penal Code articles "like international criminal law generally, fail[s] to provide a legal basis for indicting the East German border

¹⁸⁴ "A citizen of the German Democratic Republic who participates in war-like activities for the oppression of a people is liable to imprisonment . . . ." Id. art. 88 (Complicity in Acts of Oppression).
¹⁸⁵ "A person who undertakes to persecute, expel, wholly or partially destroy national, ethnic, radical or religious groups or to commit other inhuman acts against such groups is liable to imprisonment of not less than five years . . . . A person who, thereby intentionally causes particularly serious consequences is liable to life imprisonment or the death penalty." Id. art. 91 (Crimes against Humanity).
¹⁸⁶ "A person who in armed confrontations violates generally accepted rules of international law . . . is liable to imprisonment of not less than one year . . . . A person who intentionally causes, by his crime, particularly serious consequences is liable to imprisonment for life or to the death penalty." Id. art. 93 (War Crimes).
¹⁸⁷ The following discussion will exclude categories of international crimes which do not apply in this situation since they do not limit a state's power to exercise control over its own population.
¹⁸⁸ I M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW, Crimes 1 (1986).
¹⁹⁰ Adams, supra note 155, at 285. Adams refers specifically to Bassiouni's fairly inclusive list of international crimes which, despite its comprehensiveness, does not mention lethal border protection. Id. See supra note 188 and accompanying text.
¹⁹¹ Adams, supra note 155, at 285. There is, of course, some disagreement on this point. For example, one view holds that states are allowed to patrol and control their own borders, but are not allowed to use deadly force. See Brunner, supra note 60, at 216. Even when one considers that all States are permitted to control border crossings, the harsh border regime, the potentially lethal border security devices and the use of firearms—especially at the border between the two Germanys but elsewhere too—are still in contravention of international law. They serve to prevent by force conduct which, in most cases, is simply the exercise of the human right to freedom to travel abroad, a right which has been denied by the States in question in disregard of international law.
The border guards did not commit crimes of torture, aggression, genocide, or oppression. Therefore, the guards cannot be prosecuted under either Articles 8(1) or 91 of the G.D.R. Constitution or the "international" articles of the Penal Code.

B. International Human Rights Law

There are two legal models under which the actions of the border guards in forcibly preventing defections were legal. First, international criminal law did not address the decision to shoot defectors. Second, its own domestic law permitted such actions. However, the G.D.R. may have violated a third model—international human rights law.

East Germany ratified the International Covenant on Civil and Political Rights (CCPR) and signed the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act). In so doing, East Germany took the first step toward subjecting itself to the rule of international law. However, it declined to take the second, necessary step of implementing those agreements in its domestic legislation. Therefore, the West German prosecutor's assertions that the secret shoot-to-kill orders were in violation of international conventions appear to be true.

While both the CCPR and the Helsinki Final Act were designed to "encourage improvements in human rights," there is a difference between the two agreements. The CCPR is a formal treaty, with legally binding international rights and obligations, and the Helsinki Final Act is a

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193. Id.
194. See supra Part IV.A.
195. See supra Part III.
197. Conference on Security and Co-Operation in Europe: Final Act, 14 I.L.M. 1292 (1975) (signed by 35 nations, including East Germany, on August 1, 1975) [hereinafter Helsinki Final Act].
198. See Reinke, supra note 196, at 659.
199. The G.D.R. never fulfilled either its obligations of means or of results. It violated its obligation of means regarding the CCPR by not conforming its domestic laws to the treaty's obligations. Reinke, supra note 196, at 659. It further violated its obligation of results by failing to guarantee the rights granted by the CCPR in practice. Id.
200. Radin, supra note 129.
201. Reinke, supra note 196, at 656.
document to establish non-legal policy guidelines.\textsuperscript{202}

1. \textit{The Helsinki Final Act}

The Helsinki Final Act was signed on August 1, 1975, by the United States, Canada, and every European country except for Albania. In general, the Helsinki Final Act expresses the desire of the signatory states to “improve and intensify their relations and to contribute in Europe to peace, security, justice and co-operation as well as to rapprochement among themselves and with the other States of the world.”\textsuperscript{203}

The Helsinki Final Act has three sections, called baskets: (1) security in Europe;\textsuperscript{204} (2) cooperation on matters of science, technology, the environment and economics;\textsuperscript{205} and (3) humanitarian issues.\textsuperscript{206} In basket three, humanitarian issues, the signatory states expressed their desire to develop better human contacts, among them freedom of movement.\textsuperscript{207} More specifically, the states agreed that they “intend to facilitate wider travel by their citizens for personal or professional reasons, and to this end they intend in particular . . . to ease regulations concerning movement of citizens from the other participating States in their territory.”\textsuperscript{208}

Application of the principles embodied in the Helsinki Final Act is problematic, however, because the Act is non-binding and, as such, can be ignored without penalty.\textsuperscript{209} That the Helsinki Final Act is non-binding is

\textsuperscript{202} Id. at 648. To determine if a treaty is legally binding, one must discover “the parties’ intent to create legal rights and obligations or to establish relations governed by international law.” Id. at 649. Intent is determined by a number of factors, including the language of the agreement, whether the agreement has been published in national treaty collections, or has been registered under article 102 of the United Nations Charter. Id. The CCPR, which was adopted by the United Nations in 1966 “is a legally-binding treaty, the provisions of which create legal rights and obligations governed by international law.” Id. The Helsinki Final Act, on the other hand, does not create “legal norms to govern relations between parties.” Id. at 654 (citing Russell, \textit{The Helsinki Declaration: Brobdingnag or Lilliput?}, 70 Am. J. Intl. L. 242, 246 (1976)).

\textsuperscript{203} Helsinki Final Act, supra note 197, pmbl.

\textsuperscript{204} Id. at 1293.

\textsuperscript{205} Id. at 1299.

\textsuperscript{206} Id. at 1313.

\textsuperscript{207} The states made it “their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating States, and to contribute to the solution of the humanitarian problems that arise in that connexion.” Helsinki Final Act, supra note 197, basket 3, sec. 1.

\textsuperscript{208} Id. at basket 3, sec. 1(d). The Helsinki Final Act embodied the signatory states’ desire, among other things, to increase the ease of travel within Europe. However, the Warsaw Pact states did not allow freedom of movement outside their own countries, except to other Warsaw Pact states. Brunner, supra note 60, at 187-231.

\textsuperscript{209} While there is no penalty within the Helsinki Final Act itself, some countries have acted unilaterally to try to enforce the terms of the agreement. For example, the United States passed the so-called Jackson-Vanik amendment in the late 1970s, which linked trade with the Soviet Union with emigration from that country. William Korey, \textit{The Promises We Keep}: \textit{Human Rights, the Helsinki Process, and American Foreign Policy} 24 (1993). If the Soviet Union did not grant free emigration, the United States would deny Most Favored Nation trading status. Id. at 54. The Jackson-Vanik Amendment ultimately proved successful in getting the Soviet Union to lift many of its emigration restrictions.
evidenced by a number of aspects of the agreement. For example, "[b]oth the preparatory materials and the fact that the agreement was made expressly ineligible for U.N. registration under article 102 of the U.N. Charter suggest that the parties did not intend to become legally bound." Further, the Helsinki Final Act's Declaration on Principles "repeats the concept that principles are to guide rather than to govern relations." Lastly, the Helsinki Final Act purposely remained non-legal at U.S. insistence, in order to obviate the need for Congressional ratification. This would avoid a situation in which "any ambiguity as to the legal nature of the texts could become the source of an unnecessary dispute with Congress." There is also evidence that the Eastern Bloc countries that signed the Helsinki Final Act never intended to observe its requirements. For example, "as a recent disclosure in a leading Soviet journal made clear, the Kremlin had no intention in 1975 or afterward of honoring the Helsinki accord's references to human rights . . . . According to the journal, the 'conceptual political content' of Helsinki, as related to human rights, would be 'practically disregarded.'" Therefore, although one of the definitive statements of human rights, the Helsinki Final Act provides no teeth for enforcement.

On the other hand, some of the principles espoused in the Helsinki Final Act, such as those guaranteeing territorial integrity, inviolable frontiers, the renunciation of force to solve disputes, the prohibition of intervention in domestic affairs of a foreign state, and the right to self-determination, are also found in other documents which are unquestionably binding on the signatories, most notably the United Nations Charter. Therefore, some argue that "the fact that the [parties to the Helsinki Final Act] expressly wished to avoid hard and fast legal obligations flowing from the Act did not diminish their obligation under international law to uphold those principles."

However, "[s]ince the Act was not a treaty, the 35 signatory States were not parties to it in the legal sense and therefore could not legally invoke breaches of obligations and duties under it--unless these obligations were already binding under general international law and invocable in other contexts." Since the right to freedom of movement and emigration is neither provided for under general international law nor invocable in other contexts.

210. Reinke, supra note 196, at 654.
211. Helsinki Final Act, supra note 197. The Declaration on Principles in basket one indicates in its title that it is to "guide" relations between states, rather than to "obligate" states. Id. basket 1, sec. 1(a). The Declaration of Principles says again at its conclusion that the following principles are to guide the mutual relations of the participating states. Id.
212. Reinke, supra note 196, 654 n.36.
215. Id.
216. Id. at 533.
contexts, such as the U.N. Charter, the Helsinki Final Act is not binding in that regard.

2. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (CCPR) appears to have more binding effect on the G.D.R. than does the Helsinki Final Act.217 The CCPR states in Article 12(2) that “[e]veryone shall be free to leave any country, including his own.”218

As such, preventing a citizen of the G.D.R. from leaving the country violated international law, as reflected in the CCPR. But it is questionable whether East Germany, in fact, ever accepted the principles of the CCPR.219 Indeed, although the G.D.R. undertook an international obligation to adhere to the CCPR, it “clearly failed to recognize [the right to freedom of movement and to leave, guaranteed by the CCPR] internally in either its national system of laws or in administrative practice.”220

The G.D.R. Constitution did not guarantee freedom of international movement. Article 32 stated only that “[e]very citizen of the German Democratic Republic has the right to move freely within the state territory of the German Democratic Republic within the framework of the laws.”221 There was no similar guarantee of the right to emigrate.222 The G.D.R. argued that internal freedom of movement was sufficient to satisfy the requirements of the CCPR, and therefore it did not violate its international

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217. In addition, the CCPR has an enforcement mechanism, implemented by the Human Rights Committee. As envisioned in the Covenant itself, “[t]here shall be established a Human Rights Committee. It shall consist of eighteen members and shall carry out the functions hereinafter provided.” CCPR, supra note 196, art. 28. The Committee is to hear complaints of violations of the CCPR:

If a State Party to the present Covenant considers another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. . . . If the matter is not adjusted to the satisfaction of both State Parties concerned within six months . . . either State shall have the right to refer the matter to the Committee. . . .

Id. art. 41(1)(a,c).

218. Id. art. 12(2).

219. It is one thing to ratify an international treaty, technically binding the ratifying party to the treaty, and another thing altogether to transform a treaty into domestic law. A treaty must be “transformed” or “incorporated” into the domestic law of a state before its terms become legally binding for that state's citizens. Reinke, supra note 196, at 649 n.11. The G.D.R. never included the CCPR guarantee of “freedom to leave” in its domestic law. See discussion infra Parts IV.B.2.b-c.


221. VERFASSUNG, supra note 27, art. 32.

222. Article 33 of the G.D.R. Constitution did guarantee East German citizens the legal protection of the G.D.R. when abroad, implying that it was possible for citizens to leave the country. However, that right extended only to visitation, and was quite restrictive. See id. art. 33. Reality more closely resembled Article 213 of the Penal Code. That article, concerning Unauthorized Frontier Crossing, stated that “[a] person who . . . fails to adhere to legal regulations or prescribed limitations regarding entry and exit, travel routes and time and local restrictions . . . or without government authority leaves or fails to return to the German Democratic Republic is liable to imprisonment of up to two years.” GDR Penal Code, supra note 10, art. 213.
The East German argument was not correct. The G.D.R. argued that its emigration restrictions were consistent with an escape clause within the CCPR to the basic right of emigration provided for in Article 12(2). Although Article 12(2)'s guarantee to "be free to leave any country" is worded definitively, Article 12(3) modifies it, allowing a state to implement restrictions on the right to leave, as long as those restrictions "are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." The G.D.R. claimed the right to restrict the freedom to leave as a matter of public order, a claim that was clearly inappropriate. The escape clause was intended to operate only as an exception, not as a rule. When the G.D.R. routinely denied emigration permits, the right to travel became the exception, rather than the rule. Nevertheless, the G.D.R. did not change its Constitution to conform to the CCPR rule on emigration rights.

Similarly, the G.D.R. Penal Code also failed to allow freedom of movement. To the contrary, Article II of the First Chapter of the Penal Code, which set out "Fundamentals of the Socialist State Order and Socialist Society," stated only that "[t]he Socialist order guarantees that within its scope every citizen may shape his life in complete safeguarding of his dignity, his liberty and his human rights and in conformity with the rights and interests of Socialist society, the state and its citizens." As with the Constitution, the G.D.R. did not adopt the CCPR rule on emigration rights in its Penal Code.

The failure to incorporate the CCPR into the law of the G.D.R. violated the terms of the agreement. Article 2(2) states that "[e]ach State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." East Germany did not implement many portions of the CCPR, notably Article 12, the guarantee of freedom to leave any country, including one's own.

Although East Germany may have violated the CCPR by not adopting it into domestic law, it should not be surprising that the G.D.R. did not

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223. Reinke, supra note 196, at 664.
224. CCPR, supra note 196, art. 12(2).
225. Id. art. 12(3).
226. The G.D.R. argued that its restrictions on emigration were necessary only "to protect national security, public order, public health or morals or rights and freedoms of others, as set forth in Article 12, paragraph 3 of the Covenant." Reinke, supra note 196, at 664 n.100 (citing Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant (German Democratic Republic), 19 U.N. Human Rights Comm. Add. (No. 2), U.N. Doc. CCPR/C/28 Add. 2 (1983), reprinted in 10 G.D.R. COMMITTEE ON HUMAN RIGHTS, BULLETIN 39 (1984)).
227. Reinke, supra note 196, at 665.
228. Id.
229. GDR Penal Code, supra note 10, general part, ch. I, art. II.
230. See supra notes 196-200 and accompanying text.
231. CCPR, supra note 196, art. 2(2).
amend either the Constitution or the Penal Code to incorporate the requirements of the CCPR or the Helsinki Final Act. In general, "[i]n the Warsaw Pact States, freedom to emigrate is not recognized either as a basic constitutional right or as a subjective public right guaranteed by ordinary law. It is, to some extent, made out to be incompatible with the nature of socialist society." If that view is correct, and the right to emigrate is indeed incompatible with the nature of socialist society, it appears that the G.D.R. never intended the CCPR or the Helsinki Final Act to dictate its own internal compliance with those measures.

V. German Jurisdiction to Adjudicate

Despite East Germany's obligation to and violation of international human rights law, discussion concerning such a violation is, in fact, academic. The border guard indictments have not been brought under international law. Since Germany is unified, West Germany can no longer bring suit against East Germany in an international forum. The two countries no longer exist as separate entities, therefore the indictments have become a purely domestic matter.

The Treaty on German Unity expressly states that defendants accused of crimes committed in East Germany can be prosecuted only under prior East German law. There is no cause of action if the border guards did not violate East German law. Guarding the border with force was within the limits of G.D.R. law.

Another option would be for the government to bring suit under West German law. However, it is unclear that the government has authority to sue former East German parties for alleged breaches of West German law. Whether it can depends upon whether the G.D.R. was ever a separate country, or was merely temporarily alienated from a unified Germany.

A. Argument for Applying West German Law

The principal argument for applying West German law in the border guard trials is that the F.R.G. never considered the G.D.R. a separate country. Proponents of this view maintain that the West German government refused to recognize East Germany as a separate state, even after both countries became full members of the United Nations. The refusal to recognize the G.D.R.'s legitimacy is based on the fact that "[t]he F.R.G. considered the attempt at secession by the G.D.R. from the German state ... as invalid as long as the people in the G.D.R. could not exercise their right of self-determination." According to this view, West Germany's view of the

233. Treaty on German Unity, supra note 91, art. 9.
234. See supra Part III.
236. Id.
two Germanys as one is manifested in the Basic Law. 237

The Constitution indicates that there was only one Germany, but that some citizens were simply prevented from taking part in its political activities. Article 146 of the Basic Law states, “This Basic Law shall become invalid on the day when a constitution adopted in a free decision by the German people comes into force.” 238 Another example of the F.R.G.’s view that East and West Germany remained unified is that the Basic Law granted citizenship to all Germans, whether living in the West, East, or elsewhere. 239 As a result, all East German citizens, “who were exiled to or fled to the West between 1949 and 1990 enjoyed the same political and


238. GRUNDGESETZ, supra note 93, art. 146. The Basic Law was written with a view toward its future disappearance. See also McCurdy, supra note 237, at 258 (“[T]he Basic Law contains a rather unusual provision among world constitutions that affirms its impermanence,” referring to Article 146.).

McCurdy points to what he identifies as the “most direct statement of what has become known as the reunification commandment.” McCurdy, supra note 237, at 258. McCurdy cites the preamble of the Basic Law, which reads as follows:

Conscious of its responsibility before God and mankind, filled with the resolve to preserve its national and political unity and to serve world peace as an equal partner in a united Europe, the German people in the [West German] Länder has, by virtue of its constituent power, enacted this Basic law of the Federal Republic of Germany to give a new order to political life for a transitional period.
It acted also on behalf of those Germans to whom participation was denied.
The entire German people is called upon to accomplish, by free and self-determination, the unity and freedom of Germany.

GRUNDGESETZ, supra note 93, preamble. McCurdy explains the Preamble:
Each sentence refers to the desire to maintain the unity of Germany despite its division into [East and West]. The first sentence lists the German people’s “will to preserve its national and state unity,” along with the desire to “serve world peace as a coequal member of a united Europe,” as the motivations for the eleven western Länder to establish the Basic Law. The second sentence asserts the unity of the German people by emphasizing that, in establishing the Basic Law, the Germans in the [West German] Länder . . . “have also acted for those Germans who were prohibited from participating.” The third sentence, commonly known as the “constitutional reunification commandment,” addresses the national unity issue most directly: “The entire German people remains called upon to complete the unity and freedom of Germany in free self-determination.”

McCurdy, supra note 237, at 258-59.

239. Article 116 of the Basic Law has two provisions concerning German nationality:
1. Unless otherwise regulated by law, a German within the meaning of this Basic Law is a person who possesses German nationality or who has been accepted in the territory of the German Reich [translated as, variously, “empire,” “reign,” “kingdom,” or even “domain,” and which includes all of former East and West Germany] as at 31 December 1937 as a refugee or expellee of German stock or as the spouse or descendant of such person.
economic rights as citizens of the F.R.G.’s. Although the Basic Law “did not claim to be effective outside of the borders of the Federal Republic, all ‘Germans’—including residents of the GDR—could claim rights under the Basic Law as soon as they came within the territory covered by the document.”

If the continuing unity theory is correct, then West German law applies in the border guard trials. The Basic Law had no allowance for state-sponsored shooting of citizens. If Germany had remained one state despite the political division, then the order to shoot citizens would have been illegal even in the East, and West Germany would have jurisdiction to adjudicate. East Germans would have remained simply “German” citizens, and would have been subject to West German, or simply “German,” law. Indeed, the courts have confirmed that East Germany was never a separate state.

B. Argument for Applying East German Law

In contrast to the F.R.G.’s belief that Germany remained unified in law and spirit, if not in practice, the G.D.R. considered the two Germanys separate. Evidence of the East German view can be found in the G.D.R. Constitution. Unlike the F.R.G.’s Basic Law, the G.D.R. Constitution “mentioned neither the possibility nor the desirability of reunification.” On the contrary,

2. Former German national who between 30 January 1933 and 8 May 1945 [the period of Adolph Hitler’s and the Nazis’ tenure in power] were deprived of their nationality for political, racial or religious reasons, and their descendants, shall be regranted citizenship on application. They shall not be considered to have lost citizenship insofar as they took up residence in Germany after 8 May 1945 and have not expressed a wish to the contrary.

GRUNDGESETZ, supra note 93, art. 116.

240. Jeffares, supra note 237, at 538 (citing Article 116 of the Basic Law, see supra note 239). The term “German,” as used in Article 116, included people living in the G.D.R. Id.


242. The Basic Law guaranteed “the right to life and physical inviolability. The freedom of the individual shall be inviolable.” GRUNDGESETZ, supra note 93, art. 2. The G.D.R. Constitution, by contrast, had no such comparable guarantee of life, health or freedom.


However, another view maintains that, despite its technically upholding the existence of one Germany, the Court implicitly recognized the reality of two Germanys. See discussion of the Treaty on Intra-German Relations, infra Part V.B.1.

244. Jeffares, supra note 237, at 538. Although the Constitution of the German Democratic Republic does not specifically state that the two Germanys would never be reunited, a strong inference can be drawn that is, in fact, the case. See VERFASSUNG, supra note 27, art. 6(2) (“The German Democratic Republic is for ever and irrevocably allied with the Union of Soviet Socialist Republics. . . . The German Democratic Republic is an inseparable part of the community of socialist states.”).
the G.D.R. Constitution seems to have specifically avoided the question of a duty to strive for unification. 245 By this action, the G.D.R. "implicitly claimed to be a State in its own right; German indeed, but without any legal ties to the former Reich, and on this basis without any urge for (re)unification." 246

1. Separate Germanys—The Treaty on the Basis of Intra-German Relations

The Treaty on the Basis of Intra-German Relations, 247 signed in 1972, seems to uphold the G.D.R.'s claim that the two Germanys were separate countries. In fact, the Christian Social Government of Bavaria thought that the Treaty established the two Germanys as separate, and it brought suit in 1972 against the Federal Government in Bonn for violating the "reunification commandment" in the preamble to the Basic Law. 248 In the Treaty, West and East Germany expressly recognized each other's independence and legitimacy. 249 The Treaty assumed that neither the East nor the West German state would have any official control over the other. For example, Article 4 of the Treaty stated that the F.R.G. and the G.D.R. "proceed on the assumption that neither of the two States can represent the other in the international sphere or act on its behalf." 250 Article 6 further states that the F.R.G. and the G.D.R. "proceed on the principle that the sovereign jurisdiction of each of the two States is confined to its own territory. They respect each other's independence and autonomy in their internal and external affairs." 251

The two Germanys also recognized the integrity of their borders, stating that they "reaffirm the inviolability now and in the future of the frontier existing between them and undertake fully to respect each other's territo-

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245. Von der Dunk & Kooijmans, supra note 214, at 520. Von der Dunk and Kooijmans do, however, see this rejection of German unity as a slow process, one which evolved through three versions of the G.D.R. Constitution. Id. at 520 n.47. Article 1 of the first draft of the 1949 Constitution reads "Germany is an indivisible democratic republic formed by the German Länder [states]." Id. Article 8 of the 1968 Constitution called for "reunification on the basis of democracy and socialism." Id. Implicit in this call for reunification is the view that the states were actually separate. The third version, from 1974, see supra note 27, contained neither a claim of unity nor a call for reunification. This recognition of the separateness of the states occurred after the F.R.G. and the G.D.R. signed the 1972 Treaty on Intra-German Relations (see infra note 247). Id. The G.D.R. regarded the Treaty on Intra-German Relations as a "moment of truth," in which the F.R.G. recognized its "full and unequivocal statehood." Id. at 520.

246. Von der Dunk & Kooijmans, supra note 214, at 520.


248. The Christian Social Government of Bavaria asked the Federal Constitutional Court to declare the treaty unconstitutional, because it disregarded the language in the preamble to the Basic Law. McCurdy, supra note 237, at 267. That language stated that "[t]he entire German people is called upon to accomplish, by free self-determination, the unity and freedom of Germany." Grundgesetz, supra note 93, preamble.

249. See von der Dunk & Kooijmans, supra note 214, at 520.

250. Treaty on Intra-German Relations, supra note 247, art. 4.

251. Id. art. 6.
rial integrity." Therefore, the treaty could have been viewed as "a rejection of the theory that the Federal Republic was acting for all of a continuing 'German Reich,' because it could have been seen as the recognition of the GDR as a separate state." Indeed, "the treaty's text greatly bolstered the G.D.R.'s claim to sovereignty and independence rather than furthered the Basic Law's reunification commandment."

Determining whether pre-1990 Germany was one country or two is critical. If East and West Germany were separate countries, only customary international law or express treaties would govern actions which took place between the two sovereign states, since "[international law] is applicable primarily in legal disputes among nations and not in disputes of law internal to a state." However, if one accepts that East Germany has always been a part of West Germany, then the government cannot bring a suit for violation of international law. If there was one Germany, then both East and West Germany were bound to the same laws and conventions. However, if there were two Germanys, then East Germany had the right to manage its own affairs. Both international law and West Germany's Penal Code would prohibit putting a citizen of another state on trial in West Germany, unless the foreign citizen had violated the law of West Germany.

West Germany adopted the rule of international law in the Basic Law. The Basic Law, by which unified Germany is now governed, states

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252. Id. art. 3.
253. Quint, supra note 241, at 482. In its 1973 decision on the validity of the Treaty, the Federal Constitutional Court narrowly upheld the treaty. See Judgment of July 31, 1973, 36 BVerfGE 1, supra note 243. The Court upheld the treaty, but "also firmly reasserted the theory of the continuing 'German Reich.'" Quint, supra note 241, at 482. The Court nonetheless "seemed to acknowledge the reality of the German Democratic Republic as a separate state and confirmed the legal effectiveness of its constitution." Id. at 482-83.
254. McCurdy, supra note 237, at 269. The Federal Constitutional Court found that the treaty was constitutional despite the fact that this meant recognizing the G.D.R. as a sovereign nation, thereby violating the Basic Law's goal of reunification. In 1973, months after the Treaty on Intra-German Relations was signed, the court stated: [W]hile it is a bilateral treaty between two states pursuant to international law . . . it is also a treaty between two states that are parts of one still existing state that is paralyzed because it has not yet been reorganized in its entirety, but that has an undivided citizenship, and whose borders it is not necessary to further specify at this point. Judgment of July 31, 1973, 36 BVerfGE at 23, 27.

Further, by signing the treaty, the F.R.G. gave up its claim to being the exclusive representative of the German people, as expressed in the Preamble to the Basic Law. See Grundgesetz, supra note 93, preamble. The F.R.G. attempted to maintain this claim after 1972, but the claim did not coincide with the reality of the international situation. "[B]y recognizing the GDR (insofar as they had not already recognized it) other States ceased to acquiesce in this claim. So for all practical purposes the FRG could no longer claim, in respect of third states, to be the sole representative of the German people." Von der Dunk & Kooijmans, supra note 214, at 523.
256. See infra Part V.B.2.
257. Article 25 of the Basic Law states that "[t]he general rules of international law shall form part of federal law." Grundgesetz, supra note 93, art. 25.
that international disputes should be settled in an international forum.\textsuperscript{258} not in a West German court.\textsuperscript{259} Indeed, "[a]n argument can be made that West German law should not be applicable as the act in question took place in a then sovereign East Germany, and thus involved only East German citizens."\textsuperscript{260}

2. West German Acceptance of East German Law—The West German Penal Code

West German Penal Code provisions also would have precluded assertion of jurisdiction over East German border guards, as the Code made no provision for jurisdiction over such acts as those committed by the border guards. The Penal Code states that "[c]onduct may be punished only if it has been made punishable by statute prior to the commission of the act," and that it applies to acts committed within Germany.\textsuperscript{261} The command to shoot defectors was not punishable by statute prior to 1990, and therefore would not fall under this provision of the Penal Code.

The Penal Code also applied to conduct outside Germany that affected domestic legal interests, such as planning a war of aggression, treason, endangering democracy, crimes against the national defense, abduction, breach of trade secrets, perjury, crimes against the environment, and acts against government employees.\textsuperscript{262} Further, the Penal Code made itself applicable to conduct outside Germany which affected internationally protected interests, such as crimes of genocide, crimes involving atomic energy, attacks on air traffic, encouraging prostitution and white slavery, narcotics crimes, counterfeiting, economic subsidy fraud, and acts committed abroad which had been made punishable by treaty.\textsuperscript{263} The act of shooting an East German should not be viewed as equivalent to mounting a war of aggression, committing treason, or undertaking any other of the punishable offenses. Therefore, the Penal Code should not apply.

Lastly, emphasizing that the Penal Code did not apply to East German border guards at any time, past or present, the Penal Code states that "[t]he German criminal law is applicable to crimes committed abroad against a German if such conduct is punishable by the law of the place where it occurred, or if no criminal law enforcement existed at the place where the crime was committed."\textsuperscript{264} In the first place, East German law did not pro-

\begin{itemize}
  \item \textsuperscript{258} "For the settlement of international disputes, the Federation will join a general, comprehensive, obligatory system of international arbitration." \textit{Id.} art. 24(3).
  \item \textsuperscript{259} Although the clause in Article 24 (see \textit{GRUNDGESETZ, supra} note 93, art. 24) probably refers to the International Court of Justice, it in no way precludes international disputes from being settled in other international fora, such as the Human Rights Committee, set up as the arbitrator for disputes arising under the CCPR. \textit{See discussion supra} note 217.
  \item \textsuperscript{260} Zumwalt & Zumwalt, \textit{supra} note 135.
  \item \textsuperscript{261} The Penal Code of the Federal Republic of Germany, §§ 1, 3, \textit{reprinted in} THE AMERICAN SERIES OF FOREIGN PENAL CODES 28, (Joseph J. Darby trans., 1987) \textit{[hereinafter FRG Penal Code].}
  \item \textsuperscript{262} \textit{Id.} art. 5.
  \item \textsuperscript{263} \textit{Id.} art. 6.
  \item \textsuperscript{264} \textit{Id.} art. 7.
\end{itemize}
hibit shooting escapees.\textsuperscript{265} Furthermore, East Germany had a very effective means of criminal law enforcement. Thus, in neither case could the West German Penal Code be interpreted as applying to East German border guards.

3. \textit{Successor State Law}

In addition to West German law’s explicit exclusion of all but the most extraordinary of East German actions from its purview, customary international law suggests that former East German law should be applied in the border guard trials. Customary international law, which can be determined from the “general and consistent” practices of states,\textsuperscript{266} is as binding upon states as express treaty law.\textsuperscript{267} A fundamental principle of international law is that sovereign states are allowed to undertake decisions on domestic matters without outside interference.\textsuperscript{268} The further question then is whether East Germany was a sovereign and independent state.

The Montevideo Convention of 1933 lists four criteria which a nation must meet to be a “state as a person of international law.”\textsuperscript{269} A state should “possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”\textsuperscript{270} Although the Convention is technically only binding on the signatory parties, which did not include the F.R.G. or the G.D.R., “the Convention has been accepted generally by the international community and it can be taken to be an accurate statement of the law.”\textsuperscript{271} East Germany certainly met all of the qualifications of a state, the last of which was evidenced by its membership in the United Nations and its rati-

\textsuperscript{51}fication of numerous international treaties. It is therefore logical to accept that East and West Germany were independent sovereign nations and that reunification was, in fact, a unification of independent states. The G.D.R. acceded to the F.R.G. and relinquished its sovereignty in 1990, but not before.\textsuperscript{272}

The G.D.R. underwent almost “total succession,” which occurs “[i]f

\begin{itemize}
\item \textsuperscript{265} See discussion \textit{supra} Part III.
\item \textsuperscript{266} Restatement (Second) of Foreign Relations Law § 102 cmt. b (1986).
\item \textsuperscript{267} For example, the Vienna Convention, ratified by, among others, the F.R.G. and the G.D.R., states that “the rules of customary international law will . . . govern questions not regulated by the provisions of the present Convention.” Vienna Convention on the Law of Treaties, May 23, 1969, preamble, U.N. Doc. A/CONF.39/27. In other words, in the absence of an express treaty on a particular matter, customary international law governs.
\item \textsuperscript{268} U.N. \textit{Charter} art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . .”).
\item \textsuperscript{269} Convention on Rights and Duties of States, December 26, 1933, art. 1, T.S. 881, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].
\item \textsuperscript{270} Id.
\item \textsuperscript{271} Nii \textit{Lante Wallace-Bruce, Claims to Statehood in International Law} 51 (1994).
\item \textsuperscript{272} Article 1 of the Reunification Treaty states that “[u]pon the accession of the German Democratic Republic to the Federal Republic of Germany . . . the Länder of [former
the legal identity of a community is completely destroyed."

When succession occurs, "[i]t seems that the successor State is only competent to prosecute if it acquires jurisdiction over the place where the crime was committed." This, in fact, did occur in the reunification of Germany. By the terms of the Treaty on the Establishment of German Unity, "[u]pon the accession [of the G.D.R. to the F.R.G.] taking effect, the Basic Law of the Federal Republic of Germany . . . shall enter into force in the [states of the G.D.R.] and in that part of Land Berlin where it has not been valid to date." The law of former West Germany essentially replaced East German law. It replaced the Constitution and the Penal Code, and the Western judiciary retrained the Eastern judiciary in Western law. It would seem that the law of the former West Germany would govern matters litigated in the courts of unified Germany.

However, there is a caveat to the wholesale transfer of law from one state to another. Although a successor state may prosecute if it acquires jurisdiction over the place where the crime was committed, "[j]urisdiction of the successor State is . . . limited to those actions which are crimes within the law of the predecessor state. Whether or not such an action is a crime in that of the successor state is immaterial." If it was legal in the predecessor state, the parties engaged in the action remain immune from suit.

Since it seems clear that East Germany was a state independent from West Germany, and since it was not illegal under East German law for border guards to shoot escapees, a West German penal code does not give rise to claims against the border guards.

Although international law makes no express statement concerning the continuance of respective domestic law when two states combine to form a new state, the Vienna Convention on Succession of States in Respect of Treaties provides an appropriate model. The Convention confirms that German courts do not have jurisdiction to hear criminal claims against East Germans who were acting legally under laws of the time. Article 31 of the Convention focuses specifically on the implications of two states uniting. It states:

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274. Id. at 223.
275. Treaty on German Unity, supra note 91, art. 3.
277. The Vienna Convention provides that treaties are non-retroactive:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Vienna Convention on the Law of Treaties, supra note 267, art. 28.
279. Id. art. 31.
When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

a) the successor State and the other State party of States parties otherwise agree; or

b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. 280

Both subsections (a) and (b) are relevant to the situation between East and West Germany. Per Article 31(a), there is no state to agree or object. However, it can be assumed that were the G.D.R. still in existence, it would object strongly to the current proceedings. 281 In addition, bringing a criminal indictment against border guards and government officials for acts that were legal under G.D.R. law 282 implicates Article 31(b). The G.D.R. was free to prosecute the guards for violating G.D.R. law if it thought they had done so, but the government never took that action. To do so now is clearly, as the Vienna Convention states, "incompatible with the object and purpose" of G.D.R. law.

Conclusion

The Government of Germany seems to think that international law and East German sovereignty may be trumped for the purposes of the border guard trials. Germany seems to think that "the claim that sovereignty prevents scrutiny of a state's human rights has been at least partially overcome." 283 The Basic Law states that "if in litigation it is doubtful whether a rule of international law forms part of federal law and whether it creates direct rights and duties for the individual, the courts shall obtain the decision of the Federal Constitutional Court." 284 In accordance with the Constitutional provision, the Federal Constitutional Court (Bundesverfassungsgericht) decided in 1993 that a West German court could adjudicate the case against the border guards. 285

Perhaps former East German law should govern criminal trials of former East German citizens, despite the fact that the allegations involve breaking both international and West German law. The Treaty on Reunification contains a number of articles which accept East German law for certain purposes. For example, Article 9(1) states that "the law of the German Democratic Republic valid at the time of signing of this Treaty . . .

280. Id.

281. The inference can be drawn from statements such as those made by former G.D.R. President Egon Krenz, on hearing of his indictment: "For my political activity in the German Democratic Republic, I am not subject to the legislation of the Federal German Republic, under national or international law." Crawshaw, supra note 112.

282. See discussion supra Part III.

283. BASSIOUNI, supra note 188, at 15.

284. GRUNDGESETZ, supra note 93, art. 100(2).

285. See supra note 243 and accompanying text.
shall remain in force in so far as it is compatible with the Basic Law." In addition, both the West German Penal Code and Basic Law prohibit retroactive punishment. If shooting East Germans who were trying to escape was legal under applicable East German law at the time of the shootings, then no later assertion of the illegality of those acts should be permitted, under both Penal Code and Basic Law reasoning.

East Germany was not the same state as West Germany. If the issue was in question before 1972, it was not thereafter. It cannot be said, therefore, that there was one "German law" which was applicable to one "Germany." From 1945 to 1989, there was only the Federal Republic of Germany and the German Democratic Republic. West Germany had one code of law, governed by the Basic Law and the West German Penal Code, and East Germany had a different code of law, governed by its own constitution and penal code.

East German law may have violated international law, but that is not the relevant question. The relevant question is whether the border guards and the Politburo violated East German law. Only if they did can they be tried by a German court. This is specifically stated in the Unification Treaty—crimes committed in the G.D.R. that were, as yet, unpunished, could only be tried under East German law. The East German border guards did not break East German law. Since the soldiers guarding the East German border did so in conformity with East German law, their actions should now be given the legal deference they deserve.

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286. Treaty on German Unity, supra note 91, art. 9(1).
287. The Penal Code of the F.R.G. states that "Conduct may be punished only if it has been made punishable by statute prior to the commission of the act." FRG Penal Code, supra note 261, tit. 1, § 1. Similarly, the Basic Law states that "An act may be punished only if it was punishable by law before the act was committed." GRUNDGESETZ, supra note 93, art. 103(2).