What Is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards

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INTRODUCTION

Legal philosophers have long debated the purpose, meaning and nature of law. These jurisprudential debates are often abstract and theoretical. Currently, however, the world is experiencing significant political and legal upheavals which provide practical opportunities to examine the nature of law and the manner in which law organizes society. The transition from communism to democracy and capitalism in Eastern and Central Europe, as well as in the former Soviet Union, underscores the fundamental interdependence of society, law, and morality. The injustices of the old regimes, exemplified by the power of the East German state security force, haunt the new societies.[1] Given these injustices,[2] the questions of law and justice in the new legal systems are particularly acute.

The fundamental reorganization of any legal system presents many difficult questions for ordinary citizens, whose daily conduct depends on following the appropriate rules. What is the source of positive law? What makes that positive law legitimate?

[1] *See, e.g.*, John P. Burgess, *Coming to Terms with the East German Past*, FIRST THINGS, Mar. 1992, at 27, 30 (explaining the personal and social difficulties Germans encounter when confronting individual complicity with the communist system and failures of intellectual integrity and moral courage).

[2] *See* Alex Kozinski, *The Dark Lessons of Utopia*, 58 U. CHI. L. REV. 575 (1991); Wiktor Osiatynski, *Revolutions in Eastern Europe*, 58 U. CHI. L. REV. 823 (1991); *Former Premier Should Face Tribunal of State, Sejm Resolves*, PAP PRESS WIRE, Oct. 12, 1991, *available in* LEXIS, Nexis Library, Wires File (detailing the Polish Congress's decision to try the former premier for corrupt acts committed under communism); Leszek Maza, *Czecho-Slovakia: Crisis in the Courts*, THE WARSAW VOICE, Nov. 17, 1991, *available in* LEXIS, Nexis Library, Wires File (outlining the difficulty of dealing with collaborators of the former State Security Service).

Who is empowered to articulate law? What is justice? Who may legitimately decide and administer justice? What rules govern my interaction with other individuals until the new legal rules are articulated? How can I know what is legally expected of me?

The notion that law is a means of organizing society is hardly novel. However, people have always organized themselves into groups and associated with one another using mechanisms less formal than a legal system to govern their interaction. In such associations, personal interactions are ordered and defined by some system of rules other than law, such as kinship, religion, or custom.[3]

In a world less dependent on law, the question of how a society organizes or reorganizes itself when its legal system ceases to exist or to be legitimate, might be less problematic. Other systems of rules could step in to fill the vacuum.[4] Today, however, the pervasiveness of law and increased pluralism preclude most other systems from providing answers to the questions of reorganization on a national level. In addition, a growing commitment to the rule of law and the individual freedom allowed by the rule of law requires that legal principles provide answers to the difficulties of transition. In fact, it is precisely this commitment to the rule of law that makes reorganizing a legal system so chaotic. The rule of law is directed towards fairness and individual freedom, but its principles may conflict with what people perceive as just punishment for those in a previous regime whose actions violated the rule of law. Although law is meant to further justice, law and justice are often not the same.

Few aspects of the Eastern European transition have captured the poignancy, ambivalence, and sheer pain of a massive societal reorganization according to law as the recent trials of East German border guards. These guards stood at the border between East Germany and West Germany, along the Berlin Wall; they were charged with the duty of defending the socialist system against internal and external attack. They now stand trial in a

[3] *See generally* MAX WEBER, ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein trans., 1954).

[4] *See, e.g.*, SIGRID UNDSET, KRISTIN LAVRANSDATTER (1935) (providing a fictional but historically accurate account of the kinship structure of early Denmark and how that served as a legal system); C. Paul Dredge, *Dispute Settlement in the Mormon Community: The Operation of Ecclesiastical Courts in Utah*, *in* 4 ACCESS TO JUSTICE: THE ANTHROPOLOGICAL PERSPECTIVE 191 (Klaus-Friedrich Koch ed., 1979) (discussing how ecclesiastical courts filled the need for civil and criminal dispute resolution in Utah before and shortly after statehood).

united Germany for killing those who attempted to leave what was supposed to be a socialist utopia. In the context of these trials, the questions that the ordinary citizen asked above are complicated by societal questions. How can a united Germany provide justice for those harmed by the communist regime in East Germany without repeating the injustices of that regime? Does a present commitment to the rule of law preclude punishment of those who had no commitment to the rule of law in the past? Resolution of these questions will influence German society and its perceptions of law, justice, and morality far into the future. A fair outcome will help to provide the basis for a coherent and stable Germany.

The complex issues of how a society in transition uses law and a commitment to the rule of law to reorganize itself are the focus of this paper. Part I of the paper posits a definition of the rule of law and proposes the rule of law as a standard by which to examine the problems of transition. Part II briefly examines the Nuremberg Trials from a rule of law perspective, primarily as background for the examination of the East German border guard trials. Part III focuses on the trials of the former East German border guards in the context of the Federal Republic of Germany's commitment to the rule of law and natural law.

I. THE RULE OF LAW

Law is a means of organizing society according to rules. The rule of law does not condone mere legality, but is rather "a rule concerning what the law ought to be, a meta-legal doctrine."[5] In other words, the rule of law provides the framework, the overarching principles, for organizing a system of laws. According to F.A. Hayek, under the rule of law, laws must be general and abstract, prospective, known and certain, and equally applicable to all individuals.[6] In addition, law-making and law-enforcing powers should be separated.[7] H.L.A. Hart does not use the term rule of law, but he argues that a legal system must consist minimally of "general rules—general both in the sense that they refer to courses of action, not single actions and to multiplicities of men, not single individuals."[8] "Natural procedural justice" means

[5] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 206 (1971).
[6] *Id.* at 208-09.
[7] *Id.* at 210.
[8] H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 81 (1983).

"objectivity and impartiality in the application of law."[9] Lon Fuller sees law as ordered by its own internal morality.[10] This internal morality demands that law be prospective rather than retroactive and public rather than secret.[11]

Although these philosophers use different terminology—rule of law, natural procedural justice, the internal morality of law—and come from different jurisprudential camps, all three describe essentially the same over-arching principles. This paper uses the term rule of law to describe the meta-legal principles of certainty, publicity, prospectivity, generality, and separation of powers. The value of using the rule of law as a framework is in its method of organizing society to promote individual freedom by making reasonably clear to individuals the legal consequences of their actions.

II. THE NUREMBERG TRIALS

On October 1, 1946, the Allied International Military Tribunal ("Tribunal")[12] sentenced twelve German Nazis to death for crimes against peace, crimes against humanity, and war crimes.[13] On October 16 the Tribunal carried out its judgment of death by hanging.[14] The Tribunal had previously sentenced other German men for the same crimes, three to life imprisonment and four to imprisonment of between ten and twenty years.[15]

Whether these judgments were anything more than "victor's justice" has been the subject of voluminous debate.[16] "Victor's justice" is not justice according to the rule of law, but rather a judgment based on the victor's power to dictate outcomes to a

9 *Id.*

10 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630, 645 (1958).

11 *Id.* at 650-52.

12 The United States, the French Republic, the Soviet Union, and the United Kingdom established the Tribunal. *See* Judgment of the International Military Tribunal, *in* NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 1 (1947) [hereinafter Judgment]. Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, Luxembourg, New Zealand, Netherlands, Norway, Panama, Poland, and Yugoslavia also adhered to the Charter of the Tribunal. *Id.*

13 ROBERT H. JACKSON, THE NÜRNBERG CASE at xii-xiii (1947).

14 *Id.* Hermann Göring committed suicide by poisoning a few days earlier.

15 *Id.*

16 *See, e.g.,* RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 6-19 (1971); JUDITH N. SHKLAR, LEGALISM (1964); Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise,* 63 S. CAL. L. REV. 833 (1990); Sidney E. Jaffe, *Natural Law and the Nürnberg Trials,* 26 NEB. L. REV. 90 (1947); Karl Jaspers, *The Significance of the Nürnberg Trials for Germany and the World,* 22 NOTRE DAME LAW. 150 (1947); Stuart A. Scheingold, *Nuremberg Reconsidered: Conot's Justice at Nuremberg,* 1985 AM. B. FOUND. RES. J. 375.

vanquished people. The Allied powers presented the trial as a principled attempt to further the purposes of law. Robert Jackson, Chief Counsel for the United States, argued passionately in his opening statement that the trial was one of law rather than vengeance:

> The privilege of opening the first trial in history for crimes against peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.[17]

Likewise, Sir Hartley Shawcross, Chief Counsel for the United Kingdom, described the trial as establishing "that victory is not enough, that might is not necessarily right, that lasting peace and the rule of law is not to be secured by the strong arm alone."[18] The Tribunal itself articulated its duty as one "in accordance with the sacred principles of law and justice."[19] Through their rhetoric, the victorious Allies sought to emphasize the principles of law rather than the brute power underlying the trial. The Allies attempted to demonstrate that the law to which they subjected the defendants followed the principles of the rule of law: certainty, generality of application, and prospectivity.

Jackson admitted that the procedural methods used to try the defendants were "novel and experimental"[20]—there had never been an international effort like Nuremberg. But he argued that the substantive law of the International Military Tribunal, and hence the indictments of the defendants, were based on principles, both express and implicit, existing in international law.[21]

The Charter of the International Military Tribunal ("Charter") set forth the substantive law to be applied in the trial of the German Nazis. The Charter defined crimes against peace, war

17 Robert H. Jackson, Opening Statement for the United States of America, Nürnberg, Germany (Nov. 21, 1945), *in* ROBERT H. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS 3, 3 (1946) [hereinafter Opening Statement].

18 ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 177 (1983).

19 *Id.* at 146 (statement of Sir Geoffrey Lawrence at the opening session of the Nuremberg Trial).

20 Opening Statement, *supra* note 17, at 3.

21 *Id.* at 70-84.

crimes, and crimes against humanity.[22] These definitions ensured that at the time of trial the law was both known and certain. But when the defendants committed the acts that led to their indictment and conviction by the Tribunal, the law was *not* clearly known and certain. The defendants could not have used international law to predict the legal consequences of their actions. Given that uncertainty, one of the primary legal issues at the trial was the retroactive application of these newly defined rules.

For the United States, Jackson denied that the application of retroactive rules in this case would violate the rule of law. He reasoned that the defendants should not be allowed to invoke a principle of law which they had manipulated while in power:

> International Law, natural law, German law, any law at all was to these men simply a propaganda device to be invoked when it helped and to be ignored when it would condemn what they wanted to do. That men may be protected in relying upon the law at the time they act is the reason we find laws of retrospective operation unjust. But these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws. They cannot show that they ever relied upon International Law in any state or paid it the slightest regard.[23]

In its judgment, the Tribunal addressed the problem of retroactivity directly. First, it expressed a view that the law set out in the Charter codified existing international law rather than created new law: "The Charter is not an arbitrary exercise of power

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> (a) *Crimes Against Peace*: namely, planning, preparation, initiation or waging of a 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;
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> (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 persecutions 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.

Charter of the International Military Tribunal, art. 6, *reprinted in* 1 NAZI CONSPIRACY AND AGGRESSION 5 (1947).

23 Opening Statement, *supra* note 17, at 72-73.

on the part of the victorious nations, but . . . it is the expression of international law existing at the time of its creation."[24]

The Tribunal then examined the defendants' argument that only positive law should be used to determine legal responsibility:

> It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a preexisting law. "*Nullum crimen sine lege, nulla poena sine lege.*" It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.[25]

The Tribunal found this argument less than convincing. Instead, it differentiated between positive law and concepts of justice when deciding the case:

> In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes.[26]

The Tribunal thought that through international law and their own moral sense of justice, the defendants must have known their actions were wrong. On the other hand, the Tribunal did not say that the defendants must have known their actions were illegal, only that the acts were wrong.

Considering the conduct of the International Military Tribunal in the context of the rule of law reveals serious flaws. First, the parties that articulated the law also enforced the law. Second,

[24] Judgment, *supra* note 12, at 48.
[25] *Id.* at 49.
[26] *Id.*

the Charter itself was created after most of the acts were committed; if the Charter was more than the codification of relatively clear rules, then the law was applied retroactively. Finally, although the terms of the Charter are general and abstract, it was clearly written with the conviction of certain individuals in mind.

Despite these flaws, the Tribunal and many of its participants viewed its judgment as a contribution to justice. Shawcross asked the Tribunal to show the defendants and the world that "the state and the law are made for men . . . . States may be great and powerful. Ultimately the rights of men . . . are fundamental."[27] Jackson appealed to "the common sense of mankind" which "demands that law shall not stop with the punishment of petty crimes by little people,"[28] to argue that law must be grounded in morality, particularly individual moral responsibility.[29] Jackson appealed further to the moral sensibilities of the Tribunal when in his closing argument he stated, "If you were to say of these men that they are not guilty, it would be as true to say there has been no war, there are no slain, there has been no crime."[30] Crime presupposes a law, and that law for the Tribunal, implicit even in the definitions of substantive and procedural law in the Charter, is natural law—that reasonable men in a civilized nation should have known that such actions were wrong.

It is fair to judge the Nuremberg Trials by the standards of the rule of law because the Allies committed themselves to a trial of law rather than summary executions. Summary executions would have been a raw display of power rather than a principled furtherance of law. Although the Tribunal went to great lengths to create the image of a trial of law rather than vengeance, the fact remains that if the Allies had not won World War II, there would have been no trial. The Allies were in a position to dictate law and justice only because they were victorious in the war. Rather than choose between the procedural requirement of the rule of law and the substantive results natural law or justice required, the Allies created a structure that in their minds came as close as possible to meeting the demands of each.

27 TUSA & TUSA, *supra* note 18, at 423.

28 Opening Statement, *supra* note 17, at 3.

29 *See* TUSA & TUSA, *supra* note 18, at 155.

30 Robert H. Jackson, Closing Address, Nürnberg, Germany (July 26, 1946), *in* JACKSON, *supra* note 13, at 120, 163.

III. THE RULE OF LAW AND THE TRIALS OF FORMER EAST GERMAN BORDER GUARDS

United Germany today faces many of the same questions of law and justice it faced after World War II. The Federal Republic of Germany does not face the same criticism of victor's justice as the Allies did at Nuremberg, because East Germany voluntarily acceded to the Federal Republic of Germany. Nevertheless, the answers to questions of law and justice are all the more important, because law and justice will be among the principles that unite a long-divided German society. The internal cohesion and stability of Germany depend to a large degree on the perceived fairness of unification.

A. *The Federal Republic of Germany's Commitment to the Rule of Law*

The Federal Republic of Germany has expressly committed itself to the rule of law.[31] In May 1990, Foreign Minister Hans-Dietrich Genscher made a policy speech to the *Bundestag* in which he stated that "[a] united Germany will be a free democracy based on the rule of law."[32] Article 20 of the Basic Law, Germany's constitution, further articulates this commitment to the rule of law.[33] Application of the rule of law prevents governmental infringement of the fundamental rights outlined in the Basic Law's first twenty articles. For instance, the Federal Constitutional Court ("Court") has invalidated unclearly worded statutes.[34] Vague statutes do not provide certain law. Likewise, the Court has used the rule of law to bar retroactive legislation.[35] The Court has occasionally invalidated a statute when it "clearly violates the principle of proportionality [*Verhältnismässigkeit*], the rule of law [*Rechtsstaatlichkeit*], or some related principle of justice such as legal security, clarity, or predictability."[36] Within broad

[31] The historical meaning of the term *Rechtsstaat* is beyond the scope of this paper. *See* Paul Bockelmann, *The Principles of the Rule of Law*, 4 LAW AND STATE 97 (1971) (arguing that the notion of *Rechtsstaat* as expressed in the Basic Law is a richer notion than the traditional understanding of a state governed by laws).

[32] Hans-Dietrich Genscher, Policy Statement to the *Bundestag* (May 1990), *quoted in* EASTERN EUROPE: OPPOSING VIEWPOINTS 175 (Janelle Rohr ed., 1990).

[33] GRUNDGESETZ [GG] art. 20 (F.R.G.).

[34] *See, e.g.*, Hugo J. Hahn, *Trends in the Jurisprudence of the German Federal Constitutional Court*, 16 AM. J. COMP. L. 570, 577 (1968) (citing 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 14, 45 (1951) (F.R.G.); 17 BVerfGE 67, 82 (1963)).

[35] *Id.* (citing 13 BVerfGE 261, 270 (1961)).

[36] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 59 (1989) (citing as examples the Soviet Zone Case, 2 BVerfGE 266,

outlines, the Court's conceptions of the rule of law fit within the meta-legal principles of certainty, publicity, prospectivity and generality discussed in Part I above.

B. *Identifying Applicable Law*

Several sources of substantive law are potentially relevant to the border guard trials: general principles of international law; international law incorporated into the municipal law of the German Democratic Republic or the Federal Republic of Germany; the constitutions and criminal codes of either of the previously existing republics; and natural law.

1. *International Law*

German courts, unlike the International Military Tribunal, are not international tribunals. Nonetheless, international law may apply to the cases of the East German border guards. When the alleged crimes took place, the individuals were subject to a now-defunct sovereign power. At that same time, West Germany claimed some relationship with East German nationals, so the alleged crimes may be of international concern. However, the alleged crimes may also be construed as a purely internal national matter, affecting only East Germany or the currently united Germany. The difficulty of characterizing the trials as national or international underscores the practical difficulties law faces when a society is in transition or a legal system ceases to exist.

a. *Theory of International Law*

International law develops through treaties and custom.[37] Whether binding international law exists with respect to a particular issue depends upon whether "a state follows a custom because it thinks it is obliged to do so (*opinio iuris*)."[38] This subjectively perceived obligation gives international law its force.

Because of the structure of the international community, *opinio iuris* is the only practical way to create binding international

271 (1953); Mineral Oil Case, 7 BVerfGE 171, 173-75 (1957); and Country Road Law Case, 51 BVerfGE 401, 403 (1979)).

[37] For a specific discussion of the development of international criminal law through international conventions, see WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW 33-38 (2d ed. 1991) (discussing how treaty and custom create international law); M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions, in* 1 INTERNATIONAL CRIMINAL LAW: CRIMES 1 (M. Cherif Bassiouni ed., 1986).

[38] LEVI, *supra* note 37, at 36-37 (discussing when international law is binding on a particular nation).

law. Since there is no sovereign power deciding the law, power is shared horizontally rather than hierarchically, as in a municipal legal system. Moreover, "[t]here is no common referent for the making or interpretation of legal norms, except, for instance, when national interests coincide."[39] The international system lacks many other characteristics of a municipal legal system: there is no legislature, no judge to whom nations are required to submit their disputes, and no formal legal method of enforcing judgments of courts which do exist. The states themselves are the real arbiters and enforcers of international law.[40]

In many ways, the international system could better be described as political rather than legal. As a political system, "[t]he same international norm can be and remains interpreted in quite different ways by states according to their individual interests."[41] Many scholars, however, defend the international system as relying sufficiently on rules with a law-like character to be called law rather than mere politics.[42] Nonetheless, not all the principles of the rule of law apply in the international arena. For example, states' differing interpretations of international law make it difficult for that law to be known and certain. Without certainty and consistent application, international law provides little help to individuals attempting to discern whether their conduct violates its principles. Individuals and nations cannot rely on law to order the community if the substance of that law is highly uncertain.

b. *International Criminal Law and the Nuremberg Principles*

International criminal law exemplifies the problems involved in determining the content of international law. Because the the-

39 *Id.* at 4.

40 States have created some formal international dispute resolution mechanisms, such as the International Court of Justice ("ICJ"). However, there is no sovereign to which states *must* submit. The United States response to the ICJ's rulings in *Nicaragua v. United States of America* is a case in point. After the ICJ ruled on preliminary, jurisdictional issues in 1984, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (May 10) (Provisional Measures), the United States government formally notified the Court that it withdrew its general acceptance of the Compulsory Jurisdiction of the Court under the Optional Clause. *See* Edward McWhinney, *Historical Dilemmas and Contradictions in U.S. Attitudes to the World Court, in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY (Yoram Dinstein ed., 1988). Whatever the international consequences, the United States chose to reject the jurisdiction of the International Court.

41 LEVI, *supra* note 37, at 4.

42 *See* JAMES BRIERLY, THE LAW OF NATIONS 69-71 (5th ed. 1955); Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276, 1971 I.C.J 150, 168 (Jan. 26) (separate opinion of Judge Dillard).

oretical foundations of international law generally, and international criminal law specifically, are so unsettled, it is little wonder that there is scarce agreement on what constitutes an international crime.[43] "It has long been recognised that a crime is essentially an act which threatens some public interest, and that a criminal law is largely an unrealisable concept without some sense of community."[44] The lack of community in the international realm helps explain the theoretical difficulties and lack of agreement in international criminal law.

The status of the Nuremberg Principles exemplifies the lack of international community and the tentative development of international criminal law. It is not clear that those principles have been positively adopted as norms of international law or that *opinio iuris* exists.

In its first session, the United Nations General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal.[45] The General Assembly also directed the International Law Commission ("ILC") to create "a general codification of offences against the peace and security of mankind, or of an International Criminal Code."[46] In 1950, the ILC adopted a formulation of the Nuremberg Principles and presented it to the General Assembly.[47] The General Assembly, however, refused to either approve or disapprove of the principles as formulated. Instead, it directed the ILC to take account of the General Assembly debate about the nature and content of international law and proceed to draft a code of international criminal law.[48] The unwillingness of the General Assembly to commit to a specific formulation of the Nuremberg Principles should have warned the ILC of the difficulty of formulating an acceptable Draft Code of International Criminal Law ("Draft Code"). In the course of the next several years, the ILC submitted at least two versions of a Draft Code, but the General Assem-

[43] For an attempt to develop a theory of international criminal law, see Daniel H. Derby, *A Framework for International Criminal Law*, *in* 1 INTERNATIONAL CRIMINAL LAW: CRIMES, *supra* note 37, at 33.

[44] David H.N. Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 INT'L & COMP. L.Q. 445, 459 (1955).

[45] G.A. Res. 95(1), U.N. Doc. A/64/Add.1, at 188 (1946).

[46] *Id.*

[47] *Development and Codification of International Law*, 1950 U.N.Y.B. 845, 852, U.N. Sales No. 1951.I.24 [hereinafter YEARBOOK OF THE UNITED NATIONS].

[48] G.A. Res. 488(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 77, U.N. Doc. A/1775 (1950); *see* YEARBOOK OF THE UNITED NATIONS, *supra* note 47, at 857.

bly repeatedly postponed its consideration.[49]

In 1954, the United States voiced the opinion "that the project for a code of crimes under international law in today's world is impractical and inappropriate and that the project of the Draft Code should not be continued."[50] Finally, in 1957 the General Assembly agreed to postpone consideration of the Draft Code until "such time as the General Assembly takes up again the question of defining aggression."[51] This statement postponed the issue indefinitely.

Some may argue that the General Assembly's initial affirmation of the Nuremberg Principles made these principles an effective part of international law, but the international community's repeated unwillingness to adopt a document spelling out those principles demonstrates a lack of *opinio iuris*. There is nonetheless some agreement on classifying certain categories of crimes as international crimes. Werner Levi lists these crimes as piracy, slave trade, war crimes, genocide, officially sanctioned torture, and racism.[52] Daniel H. Derby points out that there is strong agreement on only four crimes—aggression, war crimes, genocide, and piracy.[53] Levi does not include aggression in his list of generally accepted international crimes; perhaps this is because the definition of aggression has proven particularly difficult, as the debate within the General Assembly demonstrated.[54]

M. Cherif Bassiouni, on the other hand, identifies twenty-two international crimes under international criminal law conventions.[55] In concluding that these offenses are crimes under international law, Bassiouni cites various sources of law, including: 1) existing international conventions; 2) recognition under customary international law; 3) recognition under general principles of international law as a crime and about which a draft code is pending before the United Nations; and 4) "prohibition of such conduct by an international convention though not specifically stating that it constitutes an international crime and which is also recognized in the writings of scholars as such."[56] Bassiouni ad-

49 *See* 1 DIGEST OF INTERNATIONAL LAW 202-04 (Marjorie M. Whiteman ed., 1963).

50 *Id.* at 203.

51 G.A. Res. 1186(XII), U.N. GAOR, 12th Sess., Supp. No. 18, at 51, U.N. Doc. A/3805 (1957).

52 LEVI, *supra* note 37, at 74.

53 Derby, *supra* note 43, at 35.

54 *See supra* text accompanying notes 46-51.

55 Bassiouni, *supra* note 37, at 1-2.

56 *Id.* at 2.

mits, however, that "[t]he very nature of all these acts and their definition in the applicable international instruments and under customary international law indicates that there are no common or specific doctrinal foundations that constitute the legal basis for including a given act in the category of international crimes."[57] Although he cites the criteria by which he named international crimes to his list, Bassiouni provides little justification for assuming that the rest of the world would agree with him.

Even Bassiouni's 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. Article 12(2) of the International Covenant on Civil and Political Rights does, however, guarantee the right to travel abroad and to emigrate permanently.[58] The German Democratic Republic ratified this international covenant, but clearly failed to recognize this right internally in either its national system of laws or in administrative practice[59]—hence, the illegal attempts to cross the border.

Summarizing a standard GDR textbook on constitutional law, Georg Brunner points out that in the GDR there were

> no social grounds for a basic right to emigrate because social conditions under socialism for the first time guaranteed stable social welfare, security and free and unimpeded development of the personality, and to allow a citizen to emigrate to the West was tantamount to delivering him up to an imperialist, aggressive and anti-social system of exploitation, a fact to which the competent organs were bound to give due consideration in the light of the responsibility borne by the socialist government towards each citizen.[60]

The extreme extension of this doctrine involved shooting those who attempted to join that imperialist, aggressive and anti-social system by crossing the border illegally.

Although such shooting denies an individual the internationally recognized human right to emigrate or travel freely abroad, it is apparently not an international crime. How killing can violate international law without being an international crime is ex-

57 *Id.*

58 "Everyone shall be free to leave any country, including his own." International Covenant on Civil and Political Rights, art. 12(2), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 54, U.N. Doc. A/6316 (1966).

59 *See* Georg Brunner, *Freedom of Movement, in* BEFORE REFORMS: HUMAN RIGHTS IN THE WARSAW PACT STATES 1971-1988, at 221 (Georg Brunner et al. eds., 1990).

60 *Id.* at 217.

plained in part by the status of individuals vis-à-vis states in international law.

c. *Standing and Jurisdiction in International Law*

Law can organize and structure a community on the international level, the state level, or the individual level. On one hand, international law governs the rights and duties of states, and municipal law governs the rights and duties of individuals.[61] On the other hand, some scholars argue that only individuals can act, and thus international law organizes individuals directly, imposing duties on and granting rights to individuals without the state as a mediator.[62] As a practical matter, states are the arbiters of international criminal law. As such, they have been unwilling to forego their sovereignty—the power they have to define their internal community. "[G]ranting individuals legal subjectivity [under international law] would limit a state's freedom of action."[63] In essence, granting rights directly to individuals under international law would mean recognizing law as ordering international society on a different level.

Under article 34 of the Statute of the International Court of Justice, states alone may present cases to the Court.[64] Individuals may only appeal to the European Court of Human Rights or the Inter-American Court of Human Rights through the respective regional commissions on human rights, whereas states may bring an action directly to the attention of the courts.[65] An individual's ability to bring an action before international courts is mediated by other institutions. Even if shooting at a state's own nationals were an international crime, a national of that state would be able to challenge the violence in the International Court of Justice or regional human rights courts only if another state or a commission took up her case.

Although an individual has only a limited ability to assert rights in the international realm independent of or against her

61 *See* LEVI, *supra* note 37, at 61-65.

62 *See* Opening Statement, *supra* note 17, at 81-84.

63 LEVI, *supra* note 37, at 73.

64 Statute of the International Court of Justice, art. 34(1), *in* THE INTERNATIONAL COURT OF JUSTICE: SELECTED DOCUMENTS RELATING TO THE DRAFTING OF THE STATUTE 157 (1946).

65 *See* Statute of the Inter-American Court of Human Rights, Oct. 30, 1980, art. 2, *reprinted in* 2 HUMAN RTS. L.J. 207, 207 (1981); American Convention on Human Rights, Nov. 22, 1969, art. 61, O.A.S.T.S. No. 36, at 1, 17, O.A.S. Doc. OEA/Ser.A/16; European Convention on Human Rights, Nov. 4, 1950, art. 44, 213 U.N.T.S. 221, 246 (1950).

own nation, the Nuremberg trials indicate that the same individual is clearly subject to duties created under international law. Nuremberg presented itself as a trial of individuals, not of Germany as a nation. Although those on trial may have been symbolic of Nazi Germany, the punishment imposed was directed at them as individuals, not at the state. War reparations were not a part of the Nuremberg judgment.

Even if there were a comprehensive definition of international crime and a resolution of individual rights and duties under international law, the question would remain: Who is authorized to impose international law? Because nations have been unable to define international crimes or to "agree . . . on what might be the legitimate responses to varying breaches of an international obligation,"[66] enforcement of international criminal law remains essentially ad hoc; "responses are usually left to the decision of each individual state unless some collective response has been agreed upon."[67] On various occasions, the international community has sought to compel states to bring legal action against its nationals accused of crimes against humanity. For example, the Inter-American Commission on Human Rights ruled that a 1987 amnesty law did not relieve the government of El Salvador from an obligation to prosecute military officials involved in the massacre of a village.[68] In this case, however, the international community has left the issue of the East German border shootings to united Germany to decide.

2. *Municipal Law*

The voluntary German reunification process provides a benchmark for determining what law should apply in the trials of the border guards. The Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity ("Unification Treaty") guided the legal transition from two Germanies to one. Article I provided that on October 3, 1990, the *Länder* of East Germany would become *Länder* of the Federal Republic of Germany in accordance with article 23 of the FRG's Basic Law and the GDR's *Länder* Establishment Act.[69] On that date, the Basic Law came into effect in

66 LEVI, *supra* note 37, at 147.

67 *Id.*

68 *See* Tina Rosenberg, *Terror, Tribunals and the Truth,* WASH. POST, Mar. 14, 1993, at C1, C2.

69 *See* Treaty between the Federal Republic of Germany and the German Demo-

the parts of united Germany where it had previously not been in force. While extending the federal law of the FRG into the territory of the former GDR,[70] the drafters of the treaty recognized the immense practical difficulties of integrating two distinct legal systems and detailed a list of exceptions and modifications in Annex I.[71] Thus, the Unification Treaty provided for the continuing validity of much of GDR law.[72]

In addition, the Criminal Code of the FRG provides the foundation for arguing that GDR law should continue to govern crimes committed before unification: "The punishment and its incidental consequences are determined pursuant to the law in force at the time of the act."[73] Furthermore, "[a]n act can be

cratic Republic on the Establishment of German Unity, Aug. 31, 1990, F.R.G.-G.D.R., art. 1 [hereinafter Unification Treaty], *reprinted in* 30 I.L.M. 457, 464 (1991).

70 *See id.* art. 8, 30 I.L.M. 469.

71 Annex I to Unification Treaty, *in* FEDERAL LAW GAZETTE OF THE F.R.G., BGB1.II, at 889 (Sept. 28, 1990), provides among other things for the continued existence of business associations incorporated under the East German Law of Associations of February 21, 1990. It provides that contractual obligations created under GDR law before October 3, 1990 will continue to be governed by East German law, although employment contracts will be subject to FRG law. The Annex also provides detailed explanations on the proper law to be applied in antitrust, copyright, and patent and tax cases. *See* Werner F. Ebke, *Legal Implications of Germany's Reunification*, 24 INT'L LAW. 1130, 1131 (1990).

72

> (1) Law of the German Democratic Republic valid at the time of signing of this Treaty which is Land law according to the distribution of competence under the Basic Law shall remain in force in so far as it is compatible with the Basic Law, notwithstanding article 143, with the federal law put into force in the territory specified in article 3 of this Treaty and with the directly applicable law of the European Communities, and unless otherwise provided in this Treaty. Law of the German Democratic Republic which is federal law according to the distribution of competence under the Basic Law and which refers to matters not regulated uniformly at the federal level shall continue to be valid as Land law under the conditions set out in the first sentence pending a settlement by the federal legislator [sic].
>
> (2) The law of the German Democratic Republic referred to in Annex II shall remain in force with the provisos set out there in so far as it is compatible with the Basic Law, taking this Treaty into consideration, and with the directly applicable law of the European Communities.
>
> (3) Law of the German Democratic Republic enacted after the signing of this Treaty shall remain in force to the extent agreed between the Contracting Parties. Paragraph 2 above shall remain unaffected.
>
> (4) Where law remaining in force according to paragraphs 2 and 3 above refers to matters within the exclusive legislative power of the Federation, it shall remain in force as federal law. Where it refers to matters within concurrent legislative powers or outlining legislation, it shall continue to apply as federal law if and to the extent that it relates to fields which are regulated by federal law in the remaining area of application of the Basic Law.

Unification Treaty, *supra* note 69, art. 9, 30 I.L.M. 470.

73 STRAFGESETZBUCH [Penal Code] [StGB] § 2 (F.R.G.) [hereinafter StGB FRG], *reprinted in* I GERMAN CRIMINAL LAW: THE CRIMINAL CODE AND THE NARCOTICS LAW 19

punished only if the punishability was provided by law before the act was committed."[74] These provisions were part of the FRG's Criminal Code before transition and reflect a long-term commitment on the part of the FRG to the rule of law.

a. *The Law of the German Democratic Republic*

i. *Incorporation of International Law in the Municipal Legal System of the GDR*

The GDR incorporated international law into its Constitution and Criminal Code as valid municipal law to be applied within GDR territory. Article 8(1) of the GDR Constitution of 1968 provided: "The generally accepted rules of international law serving peace and peaceful international cooperation are binding upon the state and every citizen."[75] Similarly, article 91 of the Constitution provided 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."[76] The general language of these provisions does not offer much guidance to a court, a state authority, or an individual in determining the generally accepted rules or norms of international law or how these rules apply to a particular problem.

How broadly these provisions should be interpreted is subject to debate. H. Kröger limited the norms of international law that bound state authorities and individuals to those "formulated in articles 1 and 2 of the U.N. Charter and in the Declaration of the Principles of International Law."[77] However, articles 1 and 2 of the U.N. Charter focus on relations among states and peaceful resolution of international conflicts rather than on international human rights.[78] Likewise, the Declaration of the Principles of International Law focuses on inter-state relations rather than on a

(Gerold Harfst & Otto A. Schmidt trans., 1989). Friederich-Christian Schroeder opines that GDR law should apply only where current FRG sanctions are harsher than GDR sanctions. Friedrich-Christian Schroeder, *The Rise and Fall of the Criminal Law of the German Democratic Republic*, 2 CRIM. L.F. 217, 231 (1991).

74 StGB FRG, *supra* note 73, § 1.

75 DIE VERFASSUNG DER DDR [constitution] [VERF] art. 8, § 1 (G.D.R.), *reprinted in* 1968 LAW & LEGIS. IN THE GDR 89, 90.

76 VERF, *supra* note 75, art. 91.

77 H. KRÖGER, I VOLKERRECHT 83 (1973), *cited in* Wladyslaw Czaplinski, *Relations Between International Law and The Municipal Legal Systems of European Socialist States*, 14 REV. SOCIALIST L. 105, 118 (1988).

78 U.N. CHARTER arts. 1, 2.

state's duty to its own nationals.[79] Besides being fairly general in their content, these articles do not impose any specific obligations on individuals, nor do they grant individuals particular rights. One commentator has interpreted these constitutional provisions very broadly to include all sources of international law.[80] But, as indicated by the discussion above, there is very little agreement on what constitutes an international crime.[81]

It is possible, however, that the more specific language of the GDR Penal Code, rather than international law, would support prosecutions of violations of the Nuremberg Principles. The preamble to a Penal Code chapter argued that:

> The relentless punishment of crimes against the sovereignty of the German Democratic Republic, peace, humanity, human rights and war crimes 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.[82]

More specifically, article 85 of the Penal Code prohibited wars of aggression.[83] Preparation and carrying out of aggressive acts subjected an individual to "imprisonment of not less than three years" or, in particularly serious cases, "imprisonment for life or the death penalty."[84] Article 88 condemned "war-like activities for the oppression of a people."[85] Article 91 provided for punishment of "a person who undertakes to persecute, expel, wholly or partially destroy national, ethnic, racial or religious groups or

79 G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

80 G. SEIDEL, DAS VERHÄLTNIS VON VÖLKERRECHT UND INNERSTAATLICHEM RECHT 102 (1985), *cited in* Czaplinski, *supra* note 77, at 118.

81 *See supra* text accompanying notes 43-51.

82 STRAFGESETZBUCH [Penal Code] [StGB], as amended on Dec. 19, 1974, Apr. 7, 1977, June 28, 1979 (G.D.R.) [hereinafter StGB GDR], Special Part, Chapter 1, *reprinted in* 1979 LAW & LEGIS. IN THE GDR 37, 80. Amendments in 1987 and 1988 abolished the death penalty and reduced the sanctions for many crimes, while incorporating international crimes, such as attacks upon persons protected by international law, in conformity with the GDR's treaty responsibilities. *See* StGB GDR, *supra*, arts. 691a, 130a, 197a, 221a; Schroeder, *supra* note 73, at 225. None of these amendments affects the actions of the border guards.

83 "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." StGB GDR, *supra* note 82, art. 85.

84 *Id.* art. 86.

85 *Id.* art. 88.

to commit other inhuman acts against such groups."[86] Article 93 prohibited war crimes and provided a specific list of actions that would constitute such crimes.[87] Thus, the Penal Code adopted international law and in the process clarified how the general principles of international criminal law would be interpreted within the East German system.

Nevertheless, articles 8(1) and 91 of the GDR Constitution and articles 85, 88, 91, and 93 of the Penal Code, like international criminal law generally, fail to provide a legal basis for indicting the East German border guards. The border guards were clearly not involved in genocide, war-like activities, oppression of a particular national, ethnic, racial or religious group, or a war of aggression; therefore, they cannot be prosecuted under the aforementioned articles of the GDR Constitution and Penal Code.

ii. *GDR Penal Code and Constitution*

Under the Penal Code of the GDR, an unlawful frontier crossing was a criminal act,[88] which the border guard, as a member of the socialist society, had a duty to prevent—particularly since an illegal border crossing could be seen as maligning the sovereignty of the GDR.[89] It was likewise criminal to resist government measures "by the use of force or threat of force or any

86 *Id.* art. 91.

87

> (1) A person who in armed confrontations violates generally accepted rules of international law and particularly anyone who 1. employs illicit means of combat or causes them to be used; 2. commits or orders inhuman acts against the civilian population, injured or sick persons, defenceless persons or prisoners; 3. appropriates to himself or destroys without military necessity other people's property or orders others to commit such acts; 4. disregards or misuses the red-cross sign or signs of a similar significance, commits or orders the perpetration of forceful acts against persons or institutions which bear such signs; 5. commits or orders others to commit acts of violance [sic] against parlementaires; is liable to imprisonment of not less than one year.
>
> (2) A person who commits such a crime for the purpose of or in connection with aggression is liable to imprisonment of not less than five years.
>
> (3) 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.

88 *See id.* art. 213.

89 "The struggle against any criminal offence, particularly against any criminal violations of peace and the sovereignty of the German Democratic Republic and the Workers' and Farmers' State is the common cause of socialist society, its state and all its citizens." *Id.* art. 1. The Constitution of the GDR also confirmed this commitment: "It is the joint concern of socialist society, its state and all citizens to combat and prevent crime and other violations of law." VERF, *supra* note 75, art. 90.

other major disadvantage" when an official was engaged "in the dutiful carrying out of public duties entrusted to him for the safeguarding of law and order."[90] Continuing to cross the border after being told to stop could be viewed as resisting government measures designed for safeguarding law and order, although it is hard to see how running away from a border guard with a machine gun could create a "major disadvantage" to the guard. Nonetheless, as a whole, the GDR's Penal Code sanctioned attempts to prevent illegal border crossings.

The Penal Code does, nonetheless, condemn killing. It defines murder as deliberately killing another person;[91] homicide as deliberately killing another person with some mitigating circumstances;[92] and negligent homicide as death that results from "a reckless disregard of provisions for the protection of human life and health or if the offender has violated his duties regarding special care for his fellow human beings to a particularly irresponsible extent."[93] On the other hand, the Code exonerates anyone who "wards off a present illegal attack against . . . the socialist state and social order in a manner commensurate with the nature of the attack;" such an individual "acts in the interests of socialist society and its legality, and thus does not commit any punishable act."[94] The fact that no East German border guard was tried by an East German court for murder, homicide, or negligent homicide, implies that according to the official East German understanding of the law, shooting at individuals crossing the border was commensurate with warding off attacks on the socialist state.

In fact, a newspaper recently reported the story of Lutz Rathenow: "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 who tried to stop them."[95] Given this type of information, a soldier may have thought that shooting to kill was a response commensurate with the nature of the attack, even if in fact it were not. Under the Code, when an individual "oversteps the limits" of a response commensurate with the nature of the attack, a court is free to disregard penal

90 StGB GDR, *supra* note 82, art. 212.
91 *Id.* art. 112.
92 *Id.* art. 113.
93 *Id.* art. 114.
94 *Id.* art. 17.
95 Tyler Marshall, *Berlin Test Case: Can Border Guards Be Punished for Shootings at Wall?*, L.A. TIMES, Sept. 3, 1991, at A14.

measures "if the person who acts has logically been placed into a state of high emotion and therefore exceeded the limits of legitimate defence."[96] Although this language seems directed at immediate causes of high emotion or provocation rather than long term indoctrination, a former border guard could argue under GDR 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. Also, deliberately shooting at individuals crossing the border does not appear to be the kind of deliberate killing that legally constituted murder in East Germany, particularly given the shoot-to-kill order from the leaders of the government.

Whether the shoot-to-kill order itself was an illegal order under East German law is another question.[97] Socialist legality offered some protection to East German citizens, but socialist legality is not a commitment to the rule of law, where certainty, generality, prospectivity and publicity are paramount. In 1954, Hilde Benjamin, a Minister of Justice for the GDR, provided a revealing insight into how socialist nations viewed legality: "Socialist legality is the dialectic unity of strict adherence to the laws and partiality in their application."[98] The Constitution of the GDR expresses that partiality as a commitment to the socialist society.[99] Similarly, "[i]t is the meaning of socialism and thus of our country 'to do everything for the benefit of Man, for the happiness of the people, for the interests of the working class and all working persons.' "[100] The criminal law of the GDR was expressly designed to further that socialist purpose. The shoot-to-kill order could be seen as an order designed to fulfill socialist purposes and therefore legal.

96 StGB GDR, *supra* note 82, art. 17(2).

97 Erich Honecker, the former leader of East Germany, is widely believed to have given the shoot-to-kill order. He was charged with 49 counts of manslaughter and 25 counts of attempted manslaughter in connection with that order, but charges were dropped after Berlin's Constitutional Court found that "it violates respect for human rights to keep in jail an accused person who is suffering from an incurable illness." Honecker is suffering from liver cancer. Marc Fisher, *Berlin Court Drops Case Against Honecker,* WASH. POST, Jan. 13, 1993, at A16; *see Honecker Charged in Berlin as Wife Heads for Chile,* AGENCE FRANCE PRESSE, July 30, 1992, *available in* LEXIS, Nexis Library, Wires File.

98 Friederich-Christian Schroeder, *Human Rights in Criminal Proceedings and in the Enforcement of Prison Sentences, in* BEFORE REFORMS: HUMAN RIGHTS IN THE WARSAW PACT STATES, 1971-1988, *supra* note 59, at 403, 415.

99 *See* VERF, *supra* note 75, arts. 86, 87, 90, 97.

100 Central Committee Report to the 8th Congress of the Socialist Unity Party (SED) 5 (Berlin 1971), *cited in* Rudolf Herrmann, *GDR Criminal Procedure Law Governed by Socialist Principles,* 1974 LAW & LEGIS. IN THE GDR 25, 26.

b. *The Law of the Federal Republic of Germany*

Some argument can be made for applying the FRG's Criminal Code in the border guard trials, although the Unification Treaty seems to preclude this possibility. While the Criminal Code of the FRG provides that an act cannot be punished if no law prohibited the act at the time it was committed and that the law in force at the time of the act governs punishment,[101] the Criminal Code provides for applicability of FRG law to acts committed abroad in a few limited cases: "German criminal law applies to other acts committed abroad if the act is punishable at the place of the act . . . and if the perpetrator . . . became a German after the act . . . ."[102] Deliberate killing was clearly punishable in the East German system. The deliberate shooting of persons crossing the border may have been illegal under the East German regime and therefore punishable even if never actually prosecuted. The perpetrators of the act became citizens of the FRG at unification and therefore could be subject to criminal prosecution under this provision.

Like the criminal code of the GDR, the FRG's Criminal Code provides punishment for murder,[103] manslaughter,[104] and less severe cases of manslaughter,[105] which could provide legal bases for convicting the border guards if FRG law is found to apply to these cases.

3. *Natural Law*

Natural law derives standards for moral conduct from the in-

101 *See* StGB FRG, *supra* note 73, §§ 1, 2.

102 *Id.* § 7.

103

> (1) The murderer will be punished by imprisonment for life.
>
> (2) Murderer is whoever, from lust to kill, in order to satisfy his sexual drive, from avarice or other base motives, treacherously or cruelly by means causing a common danger or in order to make possible or conceal another criminal act, kills a human being.

Id. § 211.

104

> (1) Whoever kills a human being without being a murderer, will be punished for manslaughter by imprisonment for not less than 5 years.
>
> (2) In especially severe cases, imprisonment for life is imposed.

Id. § 212.

105 If the slayer, through no fault of his own, has been aroused to anger by the deceased through ill treatment or serious insult inflicted on himself or on one of his dependents and was thereby provoked to commit the act on the spot or if a less severe case otherwise exists, the sentence is imprisonment from 6 months up to 5 years.

Id. § 213.

herent nature of mankind. What that nature is and how rules are derived from it is the subject of millennia-old debate.[106] Natural law does not provide a criminal code as such; the *morality* of the shootings rather than their *legality* would be the focus of prosecution under natural law. The argument that the guards were obeying the positive law of the GDR would be no defense to the fact that they killed individuals who were merely trying to exercise their natural right to leave the country. The role natural law played in the actual trial of four East German border guards will be discussed more fully below.[107]

In summary, there are four bodies of law—international law, the law of the former German Democratic Republic, the law of the Federal Republic of Germany, and natural law—which are potentially applicable to the border guard trials. None of these bodies of law provides a particularly clear set of standards by which to judge the border guards' actions.

C. *Decisions in the East German Border Guard Trials*

Although investigators in united Germany continue to research the facts surrounding the hundreds of shooting incidents that occurred along the Berlin Wall from 1961 to 1989,[108] a number of prosecutions have already taken place.[109] The reason-

106 For a historical survey of natural law, see generally FRANCIS H. ETEROVICH, APPROACHES TO NATURAL LAW FROM PLATO TO KANT (1972). For examples of the current debate, see generally CHARLES COVELL, THE DEFENCE OF NATURAL LAW (1992); CHARLES COVELL, NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992).

107 *See infra* text accompanying notes 134-141.

108 *See, e.g., East German Sentry Accused of Shooting West Berliner,* REUTER LIBR. REP., Oct. 13, 1992, *available in* LEXIS, Nexis Library, Wires File; *Six-year Term for East German Border Guard,* AGENCE FRANCE PRESSE, Dec. 9, 1992, *available in* LEXIS, Nexis Library, Wires File.

109 This paper discusses only the first two trials in detail. In the third trial, the Berlin District Court acquitted four former guards accused of shooting and seriously injuring Bernd Sievert as he attempted to escape East Germany near Checkpoint Charlie in 1971. The court cited insufficient evidence in declining to convict the men of attempted manslaughter. The guards also argued that they shot only to wound, despite the fact that they fired 47 shots. *See Four East German Guards Freed in '71 Wounding of Escapee,* N.Y. TIMES, June 23, 1992, at A11; *Third Berlin Wall Trial Ends in Acquittals,* REUTER LIBR. REP., June 22, 1992, *available in* LEXIS, Nexis Library, Wires File.

In the fourth trial, the court gave Steffen Scholz a suspended sentence for killing Silvio Proksch in 1983. The judge did not believe that Scholz had aimed only at Proksch's legs as he attempted to escape because seven shots were fired so rapidly that steady aim would have been impossible. The court nonetheless called both men, escapee and guard, "victims of the division of Germany." *Former Berlin Wall Guard Given Suspended Sentence,* REUTER LIBR. REP., July 3, 1992, *available in* LEXIS, Nexis Library, Wires File.

Klaus Kretzschmar, the defendant in the fifth trial, admitted shooting an escapee, but expressed regret. Finding that military duty did not demand the use of deadly force

ing of the judges in the first two trials provides a revealing insight into the tensions underlying the guards' trials.

In the first trial, four guards were charged with manslaughter under East German law for the February 1989 shooting death of Christian Gueffroy as he attempted to cross the "death strip" between East and West Berlin.[110] Judge Theodor Seidel, Chief Judge of the Berlin Regional Court, acquitted defendants Mike Schmidt and Peter Schmett, who "did not kill and did not intend to kill."[111] Although Mike Schmidt gave the order to shoot, his order was to shoot to apprehend but not to kill.[112] Peter Schmett fired a pistol but apparently aimed low, in an attempt to wound rather than to kill Gueffroy and a friend as they attempted to cross the Wall.[113] Judge Seidel convicted Andreas Kühnpast of attempted manslaughter because he fired directly at the two men, but gave him a suspended two year sentence.[114] Ingo Heinrich, the guard who fired the fatal shots, was convicted of manslaughter and sentenced to three and a half years in prison.[115]

to secure the border, the court convicted him of manslaughter, but gave him a suspended sentence, explaining: "Soldiers functioned as human beings according to their political education." *Ex-border Guard Convicted of Berlin Wall Shooting,* REUTER LIBR. REP., Oct. 28, 1992, *available in* LEXIS, Nexis Library, Wires File.

In the sixth trial, prosecutors charged Rolf-Dieter Heinrich with murder rather than manslaughter. The court convicted Heinrich of "groundless" manslaughter and sentenced him to six years in prison. The court found that Heinrich shot an additional nine to fifteen bullets into an escapee after he had surrendered. *Six-year Sentence is Longest yet in Wall-shooting Trials,* ASSOCIATED PRESS, Dec. 9, 1992, *available in* LEXIS, Nexis Library, Wires File; *Six-year Term for East German Border Guard, supra* note 108.

Two former guards are charged with manslaughter in the seventh trial. They riddled Michael Bittner with bullets after he shouted, "Please let me go." *Seventh Trial of East German Border Guards Starts,* REUTER LIBR. REP., Feb. 1, 1993, *available in* LEXIS, Nexis Library, Wires File.

Attempted manslaughter charges were dropped against Karl-Heinz Becker in the eighth trial when the judge ruled there was insufficient evidence to show that Becker intended to kill two escapees when he fired warning shots that did not hit anyone. *Border Guard from Famous Photos is Acquitted of Attempted Murder,* ASSOCIATED PRESS, Feb. 18, 1993, *available in* LEXIS, Nexis Library, Wires File; *East German Border Guard Acquitted,* REUTER LIBR. REP., Feb. 18, 1993, *available in* LEXIS, Nexis Library, Wires File.

110 Stephen Kinzer, *Two East German Guards Convicted of Killing Man as He Fled to West,* N.Y. TIMES, Jan. 21, 1992, at A1 (quoting Judge Seidel).

111 *Id.*

112 *See* William A. Henry III, *The Price of Obedience; Should East German Border Guards have Followed the Law and Their Orders or Listened to Their Conscience?,* TIME, Feb. 3, 1992, at 36.

113 Tyler Marshall, *Wall Guards Convicted in Berlin Death,* L.A. TIMES, Jan. 21, 1992, at A1.

114 *See* Charles A. Radin, *East German Border Guard is Jailed,* BOSTON GLOBE, Jan. 21, 1992, at 1; Robert Tilley, *Trial Reopens Bitter Divide of Berlin Wall; Calls to put Honecker in the Dock,* THE SUNDAY TELEGRAPH (London), Nov. 10, 1991, at 22.

115 *See* Kinzer, *supra* note 110.

Judge Seidel held that shooting to kill was authorized under East German law.[116] Nonetheless, he concluded, the order infringed a higher moral law.[117] Although the defendants were "at the end of a long chain of responsibility," they violated "a basic human right" by shooting at someone whose only crime was trying to emigrate.[118] Judge Seidel applied natural law when he argued that "not everything that is legal is right: There is a central area of justice, which no law can encroach upon. The legal maxim, 'whoever flees will be shot to death' deserves no obedience."[119] Consequently, "[a]t the end of the 20th century, no one has the right to ignore his conscience when it comes to killing people on behalf of the power structure."[120] Heinrich "did not just fire bad shots randomly. It was an aimed shot tantamount to an execution."[121]

Judge Seidel did not directly address the prosecution's principal assertion that the secret shoot-to-kill order was in violation of the Helsinki Accords and Geneva Convention, both of which East Germany accepted, nor did he address the issue that citizens, including soldiers such as the border guards, are responsible for obeying the international laws to which their country subscribes.[122] The court rejected the defense argument of superior orders as well as the argument that it was absurd to try people under West German legal procedures and the substantive laws of the East German communist regime.[123]

In the second trial, the court convicted Uwe Hapke and Udo Walther of manslaughter in the December 1, 1984 death of Michael-Horst Schmidt.[124] Hapke was sentenced to twenty-one months in prison and Walther to eighteen months in prison, but Judge Ingeborg Tepperwein of the Berlin Superior Court suspended both sentences.[125]

Judge Tepperwein found that East German law did not require the border guards to shoot-to-kill single, unarmed escap-

116 *See* Adrian Bridge, *Suspended Sentences for Border Guards,* THE INDEPENDENT (London), Feb. 6, 1992, at 10.

117 *See id.*

118 Kinzer, *supra* note 110, at A2.

119 Radin, *supra* note 114, at 1.

120 Kinzer, *supra* note 110, at A2.

121 Marshall, *supra* note 113, at A1.

122 *See* Radin, *supra* note 114, at 4.

123 *See id.*

124 *World News,* STAR TRIBUNE (Minneapolis), Feb. 6, 1992, at 4A.

125 *See* Bridge, *supra* note 116, at 10.

ees.[126] Uwe Hapke and Udo Walther did not have to shoot Schmidt because he posed no risk to border security, thus failing to meet the criterion for use of deadly force under communist law. "This unarmed refugee was obviously no such threat. Even if he had been, the mildest [response] should have been used, and that would have been shots at his feet. Beyond that, it should have been possible for them to refuse duty at the border or to shoot over someone's head."[127] "They would not have had to be heroes in order to avoid shooting Schmidt."[128] Nevertheless, the blame lay "not with the border guards but with those who promulgated the laws and orders."[129] Tepperwein suspended the sentences to take account of the defendants' remorse and the system in which they grew up, where unquestioning conformity was rewarded and individual conscience discouraged and often punished.[130] "It was very hard in East Germany to swim against the stream. The defendants were at the bottom of a pyramid."[131]

The differences in the rulings of Judge Seidel and Judge Tepperwein provide insight into the difficulties of justly trying the former border guards. Judge Seidel believes that East German law allowed the shoot-to-kill order; Judge Tepperwein does not. Because East Germany and its legal institutions have ceased to exist and because no East German court ever tried a guard for shooting-to-kill at the border, there is no authoritative East German source to which courts can currently look to decide this question. Judge Seidel applies natural law while Judge Tepperwein looks only at the positive law. Legal consistency is particularly difficult when judges understand the applicable law so differently. Justice in these trials is not only a matter of treating like cases alike, but also about resolving injustices of the old regime. Judge Tepperwein's sentences have generally been regarded as just,[132] while Judge Seidel's condemnation of Ingo Heinrich has not.[133]

126 *See* Mark Heinrich, *Two Border Guards Convicted of Berlin Wall Killing*, REUTER LIBR. REP., Feb. 5, 1992, *available in* LEXIS, Nexis Library, Wires File.

127 *Id.*

128 Robin Gedye, *Berlin Wall Guards Who Killed Fugitive Go Free*, DAILY TELEGRAPH (London), Feb. 6, 1992, at 9.

129 *Id.*

130 *See* Heinrich, *supra* note 126.

131 *Id.*

132 *See, e.g., Conviction of Wall Border Guards*, THE WEEK IN GERMANY, Jan. 24, 1992 (presenting German press criticisms of Judge Seidel's sentencing).

133 *See, e.g., Verdict in Second Wall Border Guards Case*, THE WEEK IN GERMANY, Feb. 7,

1. *Judge Tepperwein's reasoning*

Judge Tepperwein's application of East German law is in accordance with the requirements of the Unification Treaty. From a legal standpoint, there is little in her reasoning to criticize, except that she may have misinterpreted East German border law. However, given that there is no currently available East German source to definitively say what that law was, her analysis that the East German border law allowed deadly force only when there was a risk to border security seems a plausible reading of the GDR's Criminal Code.

2. *Judge Seidel's reasoning*

Judge Seidel may also be criticized for possibly misinterpreting East German border law. Perhaps, in contrast to his reasoning, the shoot-to-kill order and the guards' actions were illegal under East German law. From a rule of law viewpoint, however, Judge Seidel's application of natural law is much more interesting and problematic than Judge Tepperwein's reasoning.

In applying natural law, Judge Seidel worked within a well-established West German legal tradition. Article 20 of the Basic Law states that "[l]egislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice."[134] Ernst von Hippel argues that this language singles out the judiciary as "protectors of the higher legal orders against the rules of mere positive law."[135] In the *Princess Soraya* case, the Federal Constitutional Court explained the meaning of article 20:

> The judge is traditionally bound by the law. This is an inherent element of the principle of separation of powers, and thus of the rule of law. Article 20 of our Constitution, however, has somewhat changed the traditional formulation by providing that the judge is bound by "law and justice." The generally prevailing view implies the rejection of a narrow reliance upon [formally] enacted laws. The formulation in article 20 keeps us aware of the fact that although "law and justice" are generally coextensive, they may not always be so. Justice is not identical with the ag-

1992 (providing excerpts of press reports supportive of Judge Tepperwein's judgments); David Margolick, *"Just Following Orders": Nuremberg, Now Berlin*, N.Y. TIMES, Jan. 26, 1992, § 4, at 6.

134 GG, *supra* note 33, art. 20.

135 Ernst von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NAT. L.F. 106, 111 (1959).

> gregate of the written laws. Under certain circumstances, law can exist beyond the positive norms which the state enacts—law which has its source in the constitutional legal order as a meaningful, all-embracing system, and which functions as a corrective of the written norms. . . . Where th[e written law fails] the judge's decision fills the existing gaps by using common sense and "general concepts of justice established by the community."[136]

The Court's language in this case appears to ground justice in the positive law of the Basic Law; justice is defined by the constitutional order, but that constitutional order is itself the result of judicial interpretation according to supra-positivist norms.[137] Commenting on the *Southwest* case,[138] Justice Gerhard Leibholz of the Federal Constitutional Court said:

> The Court holds that each constitutional clause is in a definite relationship with all other clauses, and that together they form an entity . . . . The Court even goes so far as to acknowledge the existence of a higher law that transcends positive law and to which it is necessary to hold responsible both the legislature and the constituent power.[139]

When the Court defines the supra-positivist norms as principles informing the constitutional order, or as concepts of justice established by the community, it appeals to notions of natural law, to the higher law which transcends positive law. Although one can argue that notions of natural law informed the constitutions of the former East German *Länder*,[140] the socialist tradition

136 KOMMERS, *supra* note 36, at 132-33 (citing 34 BVerfGE 269 (1973)).

137 *See id.* at 54. Kommers points out that the source of these supra-positivist norms is unclear:

> Still, it is not altogether clear from the court's jurisprudence whether the supra-positivist norms underlying the Constitution exist outside of the text, reflect the express values of the text, or account for the hierarchical order that the court has discerned among the values constitutionalized by the framers. Whatever the answer, the hierarchical system of values found to inhere in the Basic Law is itself largely a product of constitutional interpretation.

Id. at 55.

138 *See id.* at 71 (citing 1 BVerfGE 14 (1951)).

139 *Id.* at 52-53.

140 *See* Gottfried Dietze, *Natural Law in the Modern European Constitutions*, 1 NAT. L.F. 73, 79-83 (1956). Although Dietze writes that the constitutions of the former East German *Länder* contain references to natural law, he argues that their conception of natural law differs markedly from that contained in the West German Basic Law and the constitutions of West German *Länder*. The constitutions in East Germany contained primarily natural law concepts of the Age of Reason while the West German state constitutions reflect both natural law concepts from the Age of Reason and strong elements of philosophical natural law. Further, the West German *Länder* constitutions and the Basic Law also do not contain a unified conception of natural law. *Id.* at 83.

of law is essentially one of positivism.[141] It is exactly that positivism to which natural law and Judge Seidel object.

D. *Positivism and Natural Law in Post-World War II Germany*

The conflict between positivism and natural law is not new to either German jurisprudence or the German conscience. The current commitment to natural law expressed in the Basic Law and in decisions of the Federal Constitutional Court came about, at least in part, as a result of the excesses of positivism during the Third Reich. German courts in the immediate post-World War II era often looked to natural law to remedy the injustices of the Third Reich. Judge Seidel adheres to that tradition in applying natural law to condemn the actions of the former border guards in East Germany.

Gustav Radbruch, an eminent German legal philosopher whose experience with the Third Reich converted him from positivism to natural law, explained the dangers of positivism and a judge's duty to declare positive laws invalid when they conflict with natural law:

> For the soldier an order is an order; for the jurist, the law is the law. But the soldier's duty to obey an order is at an end if he knows that the order will result in a crime. But the jurist, since the last natural law men in his profession died off a hundred years or so ago, has known no such exception and no such excuse for the citizen's not submitting to the law. The law is valid simply because it is the law; and it is law if it has the power to assert itself under ordinary conditions. Such an attitude towards the law and its validity [i.e., positivism] rendered both lawyers and people impotent in the face of even the most capricious, criminal, or cruel of laws. Ultimately, this view that only where there is power is there law [*Recht*] is nothing but an affirmation that might makes right [*Recht*]. [Actually] law [*Recht*] is the quest for justice . . . if certain laws [*Gesetze*] deliberately deny this quest for justice (for example, by arbitrarily granting or denying men their human rights) they are null and void; the people are not to obey them, and jurist must find the courage to brand them unlawful [*ihnen den Rechtscharakter absprechen*].[142]

141 *See, e.g.*, HENRY W. EHRMANN, COMPARATIVE LEGAL CULTURES 27 (1976); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 705 (1985).

142 GUSTAV RADBRUCH, RECHTSPHILOSOPHISCHE BESINNUNG [REAPPRAISAL OF LEGAL PHILOSOPHY], *cited in* von Hippel, *supra* note 135, at 110.

Various cases from the post-World War II era demonstrate how seriously judges took this charge. Courts used natural law to demonstrate that the Third Reich relied on the "rule of unjust law" rather than on a true rule of law.[143] On August 12, 1947, the Frankfurt Appellate Court (*Oberlandesgericht*) heard the case against physicians who had been involved in "experimental killings." The physicians claimed that they had not broken the law (*Rechtswidrigkeit*) because the laws of the Third Reich sanctioned their actions. The court disagreed:

> Such a way of thinking would not do justice to the true character of the National Socialist "law." Law must be defined as an ordinance or precept devised in the service of justice [citing Radbruch]. Whenever the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice, and be considered a "lawless law [*unrichtiges Recht*]." An accused may not justify his conduct by appealing to an existing law if this law offended against certain self-evident precepts of the natural law.[144]

In 1945 the Wiesbaden Lower Court (*Amtsgericht*) held that "[t]he laws which declared that the property of Jews had become forfeited to the state" were "incompatible with natural law," and therefore "void at the very time of their enactment."[145] When Jews demanded restoration of property confiscated upon forced emigration, another court granted their claims.[146]

In another case, a lower court held that defendants, indicted as accessories to kidnapping and murder for participating in mass arrests and deportation of Jews to Auschwitz and Theresienstadt, were not guilty because the defendants were not conscious of doing wrong and believed that they were properly acting in accordance with valid law.[147] Furthermore, the defendants did not have "certain knowledge" of the criminal intentions of Third Reich leaders to murder those they arrested.[148] The appellate court saw the situation differently:

> The liberty of a state to determine what is lawful or not

[143] Von Hippel, *supra* note 135, at 111.

[144] Judgment of Aug. 12, 1947, 2 SÜDDEUTSCHE JURISTEN ZEITSCHRIFT [SJZ] 521 (F.R.G.), *cited in id.*

[145] 1 SJZ 36 (1946), *cited in* von Hippel, *supra* note 135, at 111-12.

[146] *See* 16 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 350 (F.R.G.), *cited in* Heinrich Rommen, *Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 NAT. L.F. 1, 14 (1959).

[147] *See* Rommen, *supra* note 146, at 12.

[148] *Id.*

> within its territory may be considered as very broad, but it is not unlimited. In the consciousness of all civilized nations we find (despite all the differences of their legal systems) a common nucleus of law [*Recht*] which, according to the universal juridical convictions of all men, may not be violated by any legislative or other act of political authority. This nucleus contains certain basic norms of human actions considered as inviolable; they have been found by all civilized nations by reason of common basic moral insight [*Anschauung*] and are thus considered valid, though an individual norm of an individual state may seem to be violating them.[149]

The appellate court admonished the lower court for not applying these supra-positive norms and gave little credence to the defendants' argument that they did not know their acts were wrong. The defendants' basic instincts should have alerted them to the arbitrariness and inherent immorality of a Gestapo decree.[150] The defendants should have known their actions were wrong despite the fact that the positive law justified their actions. Under natural law, positive law is no excuse.

Similarly, the Federal Court (*Bundesgerichtshof*), on February 12, 1952, condemned the Nazi system of law:

> Those in power during the Third Reich issued numerous regulations which claimed to be "lawful" and establish "law." However, these regulations lacked the quality of laws because they violated those basic principles which are independent of the recognition of governments and stronger than any enactment by the government. Regulations issued by the government which do not even attempt to bring about true justice do not create law; and actions which conform to them remain wrong.[151]

In all of these decisions, the courts refer to principles of morality, supra-positivist principles, which require an individual to disobey immoral positive law.

Towards the end of World War II, Hitler issued the *Katastrophen*-order, which directed members of the armed forces to shoot deserters without benefit of trial. In a Federal Court case decided on July 12, 1951, an officer who had shot a young soldier

[149] Judgment of Jan. 29, 1952, 2 Entscheidungen des Bundesgertichtshofs in Strafsachen [BGHSt] 234 (F.R.G.), *cited in id.* at 11-12.

[150] *See id.*

[151] Judgment of Feb. 12, 1952, 2 BGHSt 177, *cited in* von Hippel, *supra* note 135, at 112.

absent without leave claimed that he was only following superior orders: His Nazi county-leader had ordered him to kill the soldier, and the *Katastrophen*-order sanctioned his actions.[152] The court found the defendant guilty of a civil tort and made him liable for damages to the mother of the slain soldier.[153] The court ruled that the *Katastrophen*-order had not been law even under the requirements of the Nazi regime:

> Every killing of a human being is illegal and a grave violation of an official's duties if it is not justified by a rule of law [*Rechtsnorm*]. The *Katastrophen*-order of Hitler ordering the execution without any form of trial cannot be considered a rule of law. First, it was not promulgated in the form of law that was then still valid (i.e., the *Reichs-Anzeiger*). The opinion of some Nazi jurists that all juridically relevant acts of will of the Führer, which could be considered norms, should be equal to law and thus juridically binding without regard to form is a shameful surrender by all members of the legal community [*Rechtsgemeinschaft*] to a despot. Such a theory cannot be accepted as a "source of law" under the doctrine of the rule of law.[154]

More significantly, the court ruled that even if the *Katastrophen*-order had met the requirements of legislative law in the Third Reich, it still was not valid because it violated natural law:

> Even if the *Katastrophen*-order had been promulgated in due form it could not have become law [*Recht*]. For the positive legislative act is intrinsically limited. It loses all obligatory power if it violates the generally recognized principles of international law or natural law [*Naturrecht*], or if the contradiction between positive law and justice reaches such an intolerable degree that the law, as *unrichtiges Recht*, must give way to justice . . . . Thus the *Katastrophen*-order is null and void; it is no rule of law; obedience to it is against the law [*Recht*]. The claim of the defendant that he could not know this and that he acted according to the order of his superior is unacceptable. He must be held to know that no legal system permits a soldier to escape responsibility for an infamous crime by relying on the order of a superior, if the later's orders are in stark contradiction to human morality and the laws of all civilized nations, whatever differences in positive law

152 Rommen, *supra* note 146, at 10.
153 *See id.* at 11.
154 Judgment of July 12, 1951, 3 BGHZ 106, *cited in* Rommen, *supra* note 146, at 11.

might exist among them.[155]

Despite its condemnation of specific Nazi laws, the Federal Court was unwilling to dismiss the Nazi system as completely lawless. Even if the Third Reich was an unjust system, it was competent to pass legally valid laws:

> Once the dictatorship has established itself and finds external conformity, then legal norms enacted according to the specific nature of dictatorship cannot be considered as *in se* invalid. The new form of government, even though it came into existence under breach of previous constitutional law, must be considered as legal. That is in accordance with natural law. . . . Hitler and his party gained full power, acquiescence and aid from the people and international recognition . . . . When Hitler later abused this unlimited plenitude of power through oppression and criminal acts, there was ground for a denial of legal recognition to these unjust acts . . . but this cannot change the fact that the Hitler regime, as long as it was in power, was *legally competent* to posit legally valid laws and decrees. This does not mean that all of them were—in the true meaning of the word—"*Recht*" if and insofar as in their *content* they violated the commands of natural law or the universally valid moral laws of Christian Western civilization.[156]

The Court did not fully explain why natural law justifies recognition of a government which came to power by breaching an existing constitution. In distinguishing the legal authority to posit law from the moral authority to enforce those laws, the court essentially conceded the existence of a difference between law and morality.

The Federal Court's unwillingness to condemn completely the entire Nazi system was a practical concession to positivism. It is difficult, and perhaps impossible in the modern world, to scrap an entire legal system and begin anew. If an entire system of laws is declared invalid, what replaces that system? What happens to all the judicial determinations made under the invalid legal system? Should there be a wholesale reevaluation of every single decision made? In a practical sense, such a reevaluation would be nearly impossible.

Nevertheless, if, according to principles of natural law, a par-

[155] Rommen, *supra* note 146, at 11.

[156] Judgment of Feb. 8, 1952, 5 BGHZ 76, *cited in id.* at 15.

ticular legal system was the rule of unjust law, a strong commitment to natural law would demand condemnation of the entire system. The Federal Court's argument sanctioned obedience to those laws which were not in violation of natural law; however, obedience to any laws lends moral force to the regime promulgating the immoral rules. A failure to condemn the system as a whole leaves the individual caught between two organizing principles, natural law and positive law. Therefore, the individual must determine which positive laws are legally and morally binding and which are not.

E. *Positivism and Natural Law in United Germany*

1. *Similarities to Application of Natural Law in Post-World War II Germany*

Judge Seidel's application of natural law to condemn positivism in East Germany echoes the use of natural law to condemn Nazi Germany. In fact, Honecker's shoot-to-kill order is eerily reminiscent of Hitler's *Katastrophen*-order, where soldiers were also instructed to shoot people without the benefit of trial. Under a natural law theory, the shoot-to-kill order should be subject to the same condemnation as the *Katastrophen*-order. First, the existence of the shoot-to-kill order was not widely known until after the fall of communism, so it is doubtful that the order was promulgated according to the required procedures for law of the German Democratic Republic. Second, even had the shoot-to-kill order been properly formulated, it could not have been enforced as law, "for the positive legislative act is intrinsically limited;"[157] positive law becomes null and void when it contradicts justice to an intolerable degree.

The shooting of individuals attempting to cross the border to West Germany was commonly viewed in West Germany as an unjust and immoral act. Even defense counsel for Ingo Heinrich admitted that the shootings were "naturally an injustice."[158] At least one court in West Germany derived the right to freedom of movement from natural law.[159] The right to emigrate is also recognized as a basic human right in the Convention on Civil and Political Rights.[160] From a natural law standpoint, the shoot-to-

[157] Judgment of July 12, *supra* note 154.

[158] Marshall, *supra* note 113, at A1.

[159] *See* Judgment of Oct. 20, 1947, 2 MONATSCHRIFT FÜR DEUTSCHES RECHT [MDR] 153, *cited in* von Hippel, *supra* note 135, at 113.

[160] *See supra* note 58.

kill order was null and void as a violation of the principles of justice and basic human rights.

Nevertheless, following the reasoning of the Federal Court in the *Katastrophen* case, the communist form of government itself must be considered legal. From a practical point of view, it is hard to discount the forty-year existence of a sovereign state active in international trade and politics. The communist government of East Germany was competent to enact legally valid laws and decrees; moreover, the Unification Treaty recognizes East German law generally as valid law, and in fact provides for the continued efficacy of many East German laws.[161] Further, united Germany has not denounced socialist law in its entirety, as the Allies did with respect to Nazi law.[162] Even in a system governed by the rule of unjust law, only specific laws are considered null and void.

Even without the complications of transition, an individual may find it extremely difficult to determine which laws are void and which require adherence. The dilemma is particularly acute if, as in united Germany, the suspect legal system engendered a morality incompatible with the West German understanding of natural law.

2. *Christian Foundations of Natural Law in West Germany*

The use of natural law in the decisions of West German courts reflects a view of "a single Christendom" as a "practical moral reference" point for determining what is just.[163] On February 8, 1952, the Federal Court decided a case based on "generally valid moral laws held in common by the Christian civilization of the West."[164] Although judges applying natural law in West Germany would probably argue that natural law is primarily founded on the nature of humanity as a whole, much of the content of natural law is based on the concept of the "Christian civilization

161 *See* Unification Treaty, *supra* note 69, art. 9, 30 I.L.M. 470; Annexes I & II, *in* FEDERAL LAW GAZETTE OF THE F.R.G., *supra* note 71. The Unification Treaty provides for the continued validity of East German court decisions; however, under certain circumstances, individuals convicted of criminal conduct in the former East Germany can seek the quashing of their conviction. Unification Treaty, *supra* note 69, art. 18, 30 I.L.M. 475.

162 *See, e.g.*, Control Council Act No. 1, Repealing of Nazi Laws, Berlin, Sept. 20, 1945, *Official Gazette of the Control Council for Germany*, No. 1, at 6, *reprinted in* 1 THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC IN INTERNATIONAL RELATIONS 51 (Günther Doeker & Jens A. Brückner eds., 1979).

163 Von Hippel, *supra* note 135, at 116.

164 Judgment of Feb. 8, 1952, 5 BGHZ 97, *cited in* von Hippel, *supra* note 135, at 116.

of the West." East Germany has historical roots in Western Christian civilization, but the Marxist-Leninist legal system did not internalize Christian morality. As defendant Uwe Hapke said to Judge Tepperwein when he argued that he was a product of his Stalinist upbringing, "You didn't grow up in the GDR."[165] Truly, Hapke grew up with a different set of moral beliefs.

In retrospect, it is easy to say that East German border guards should have known that shooting individuals attempting to cross the border violated natural law; however, the socialist system and the training of border guards fostered a distinct morality. In the first trial, the judges' questioning of defendant Mike Schmidt was designed to show that the guards had some inkling of Western morality, but instead demonstrated how insulated an East German could be from that morality:

> Question: "Weren't there others who chose to oppose the communist system?"
> Answer: "I didn't know about any."
>
> Question: "Weren't there churches in East Germany?"
> Answer: "I never went."
>
> Question: "Weren't there other children in school who refused to attend military training?"
> Answer: "Possibly, but if you refused, you got two years in prison."
>
> Question: "Didn't you know that in West Germany there were great anger and sadness about the border shootings?"
> Answer: "No."
>
> Question: "Didn't you listen to Western Radio?"
> Answer: "Never."
>
> Question: "What did you think about the automatic firing devices installed along the border?"
> Answer: "I thought they were a good thing to protect our security."[166]

Mike Schmidt did not participate in the activities or the institutions that would have taught him Western opinion and moral views concerning the shoot-to-kill order.

The East German border guards were rewarded for their special tasks. They earned eighty per cent more money than regular

165 *Two East Border Guards Convicted in Germany*, WASH. TIMES, Feb. 6, 1992, at A2.
166 Marc Fisher, *On Trial for Death at Berlin Wall*, WASH. POST, Sept. 10, 1991, at A21.

soldiers.[167] Ingo Heinrich, Andreas Kühnpast, Mike Schmidt, and Peter Schmett each earned "three days extra vacation, a buffet dinner, $85 bonuses" and medals for "defending" the border on the night they killed Christian Gueffroy.[168] The border guards' behavior was also reinforced through intimidation—secret police monitored guards' conversations and threatened guards with prison terms for expressing reservations about shooting.[169]

The East German system rewarded border guards for practicing a morality distinct from a Christian morality—it sanctioned and encouraged killing. This is not to say that even border guards bought into that morality completely. Andreas Kühnpast initially refused to sign the guard's oath promising to use weapons if necessary to defend the border. When the guards were feted for their deeds he said, "I wasn't in the mood for celebrating. I felt like throwing the money and the medals away."[170] Yet, within the East German system, "We were soldiers—conscripts—who had to obey orders or face military prison."[171] In applying natural law based in a Christian tradition, united Germany is requiring acute legal vision from border guards whose moral sight was trained on a fundamentally different socialist goal. As Andreas Kühnpast poignantly explained at trial, "We had our own laws, and we could not know others would one day apply."[172]

F. *Natural Law and Political Compromise*

Inconsistencies in West Germany's commitment to natural law during the unification process make the application of natural law to the border guards' case even more troubling. While Judge Seidel held the border guards to a high standard of morality through natural law, politics proved stronger than natural law in the resolution of abortion law conflicts.

Prior to unification, abortion was readily available in East Germany. In West Germany, on the other hand, abortion was strictly limited.[173] When, in the early 1970's, the Parliament amended the FRG's Criminal Code to permit abortion at the re-

167 *See id.*

168 Tamara Jones, *East German Guards on Trial: Can Justice Scale the Wall?*, L.A. TIMES, Sept. 17, 1991, at A1.

169 *See* Fisher, *supra* note 166.

170 Tilley, *supra* note 114, at 22.

171 *See* Jones, *supra* note 168.

172 *Id.*

173 StGB FRG, *supra* note 73, §§ 218-219b.

quest of the mother during the first trimester of pregnancy, the Christian Democratic Union and some state governments challenged the constitutionality of the law.[174] The Federal Constitutional Court relied on article 2(2) and article 1(1) of the Basic Law to find an affirmative state duty to secure and preserve human life.[175] Article 2(2) provides in relevant part, "Everyone shall have the right to life and to physical integrity."[176] Article 1(1) states, "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."[177]

In deciding the case, the Court found that constitutional norms "represent an objective order of values that serves as a basic constitutional decision for all areas of the law and provides guidelines and impulses for legislative, administrative, and judicial practice."[178] Within that objective order of values, "human life represents a supreme value . . . that needs no further justification; it is the vital basis of this human dignity and the prerequisite of all other basic rights."[179] This recognition of the right of human dignity is in effect a constitutionalization of natural law.

The Court further found it "appropriate for the state to use criminal law to punish abortion;" the state must "clearly express its disapproval" of abortion.[180] The defense of human life is the "ultimate value upon which all other rights depend" and is thus "a fundamental responsibility of the legal order under the Basic Law."[181] It is difficult to imagine stronger statements regarding human life than "the ultimate value," the defense of which is the state's "fundamental responsibility."

Despite the primacy of the value of human life within the objective order of values that should guide all areas of German law, under the Unification Treaty, East Germany's liberal abortion law remained in effect in the former East German territory. Human life was not protected in the way that, according to the Court's understanding, the Basic Law and natural law demand.

The Unification Treaty expresses disapproval of abortion, as

174 *See* Fred L. Morrison, *Constitutional Mergers and Acquisitions: The Federal Republic of Germany*, 8 CONST. COMMENTARY 65, 70 (1991).

175 39 BVerfGE 1 (1975), *cited in* Donald P. Kommers, *Abortion & Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 267 (1977).

176 GG, *supra* note 33, art. 2(2).

177 *Id.* art. 1(1).

178 KOMMERS, *supra* note 36, at 350-51 (citing 39 BVerfGE 1 (1975)).

179 *Id.* at 351.

180 *Id.* at 352-53.

181 Kommers, *supra* note 175, at 269 (citing 39 BVerfGE at 44).

the Constitutional Court indicated is required, and works to set up the same kind of counseling and public aid services in East Germany as currently exist in West Germany.[182] Similarly, the Treaty generally looks toward implementation of a restrictive abortion law throughout united Germany. But human life did not receive the ultimate protection that natural law seems to demand. Moreover, article 31 states: "If no regulations are introduced [before December 31, 1992] the substantive law shall continue to apply in the [former East Germany territory]."[183]

Allowing East Germany's abortion law to remain in effect essentially meant that any German woman who wanted an abortion needed only travel to former East German territory to obtain one. The Unification Treaty did not attempt to limit application of the East German abortion law to former East Germans. The abortion compromise concedes much to politics at the expense of natural law. Nonetheless, there has been no suggestion that the Unification Treaty is invalid because it does not conform to natural law.[184]

182 The Unification Treaty provides that:

> It shall be the task of the all-German legislator [sic] to introduce regulations no later than 31 December 1992 which ensure better protection of unborn life and provide a better solution in conformity with the Constitution of conflict situations faced by pregnant women—notably through legally guaranteed entitlements for women, first and foremost to advice and public support—than is the case in either part of Germany at present. In order to achieve these objectives, a network of advice centres run by various agencies and offering blanket coverage shall be set up without delay with financial assistance from the Federation in [former East German territory]. The advice centres shall be provided with sufficient staff and funds to allow them to cope with the task of advising pregnant women and offering them necessary assistance, including beyond the time of confinement.

Unification Treaty, *supra* note 69, art. 31(4), 30 I.L.M. 487.

183 *Id.* In June 1992, the *Bundestag* passed a law giving a woman the right to an abortion within the first ninety days of a pregnancy, provided she accepted counseling before receiving the abortion. *See Germany Liberalizes its Abortion Law,* THE WEEK IN GERMANY, July 3, 1992, *available in* LEXIS, Europe Library, AllEur File. In early August, however, shortly before the law was to go into effect, the Federal Constitutional Court granted a temporary injunction blocking implementation of the law. *German Courts Postpone Decision on Abortion,* CHRISTIAN SCI. MONITOR, Aug. 6, 1992, at 3. On May 28, 1993, the Constitutional Court overturned the law, ruling that most abortions are illegal. Under the Court's ruling, the GDR's liberal abortion law will no longer apply in former East German territory after June 16. *See* Marc Fisher, *German Court Rules Most Abortions Illegal,* WASH. POST, May 28, 1993, at A20. The Bundestag is now faced with writing new legislation that, under the Court's ruling, affords sufficient protection to fetal life.

184 Even if such a challenge were to arise, it seems likely that the Federal Constitutional Court would uphold the Unification Treaty because the abortion compromise was necessary to bring about German unification, also a primary value of the Basic Law. In 1973 the Constitutional Court denied Bavaria's claim that the Inter-German Treaty between the Federal Republic of Germany and the German Democratic Republic of 1972 was null and void because it violated the Basic Law. The Court held that decisions as to

The abortion compromise, which was necessary to bring about unification, is troubling when compared with the application of natural law in the border guard trials. The compromise seems to suggest that natural law, as a legal organizing principle, bends to political considerations. The marked difference in legal and ethical views regarding abortion in East Germany and West Germany appeared to be a stumbling block for unification,[185] but political compromise won the day and unification occurred. The border guards had no similar opportunity in the political process to argue that natural law should not apply to their cases.

IV. CONCLUSION

Of itself and through the principles of the rule of law, positive law makes a strong claim to be the final arbiter of an individual's legal responsibility and a nation's legal structure. The rule of law says very little about the content of laws as it sets a framework for a legal system. Natural law likewise makes a strong claim to an individual's legal responsibility. However, natural law looks primarily to substantive justice by focusing on a law's content. When a positive law advocates immorality or injustice, natural law requires a higher moral standard. Justice requires moral responsibility which cannot be excused through compliance with immoral positive laws.

It is precisely here where natural law and the rule of law come into conflict. The rule of law demands that law only be applied prospectively, yet positive law may be inadequate to meet the demands of natural law. Natural law demands application of the moral law, even if it is retroactive. Natural law attempts to escape

"the politically appropriate and expedient ways for attaining reunification . . . ha[d] to be left to the organs of the Federal Republic responsible for such political action." Judgment of July 31, 1973, 2 BVerfGE 1/73 (1973), *reprinted in Decision of Federal Constitutional Court Concerning the Basic Treaty Between the Two German States, in* EAST EUROPE MONOGRAPHS, GERMAN UNITY: DOCUMENTATION AND COMMENTARIES ON THE BASIC TREATY 34, 45 (Frederick W. Hess ed., 1974). The Court concluded that it could only block a legislative mandate if there was an unequivocal abuse of discretion or if the chosen course of action "for legal or factual reasons obviously contradicts reunification in a setting of liberty." *Id.* at 46. In that case, the advantages of having the Unification Treaty were evident. *See* John A. Zohlman III, *The Question of Reunification: An Historical and Legal Analysis of the Division of Germany and the 1989 Reform Movement in the German Democratic Republic,* 8 DICK. J. INT'L L. 291, 303-04 (1990). The advantages of unification are also evident in the Unification Treaty itself. Moreover, the Unification Treaty repealed article 23, thereby allowing deviations from the Basic Law as temporary measures to accommodate unification. *See* Unification Treaty, *supra* note 69, art. 4(1), 30 I.L.M. 466.

185 *See* Morrison, *supra* note 174, at 70-71.

the retroactivity difficulty by imputing to the condemned individual the knowledge that his action was indeed wrong even if sanctioned by positive law.

Positive law organizes at the level of the community. The rule of law gives the sovereign the responsibility of identifying law. Natural law is often derived from a perceived consensus of fundamental human morals and values, but as applied in the East German border guards' trials and in cases condemning Nazi actions, it is very much a morality of individual conscience. The individual, despite the dictates of the community around him, should know that his actions were wrong. The individual, rather than the sovereign or the community through its positive laws, identifies what is legally obligatory.

The Federal Republic of Germany has a strong commitment to both natural law and the rule of law as organizing principles of its society. Although the Unification Treaty represents a societal commitment to how legal transition should take place, the structure of the Basic Law empowers individual judges, like Judge Seidel, to answer not only questions of law but also broader questions of justice for individuals like Ingo Heinrich, Andreas Kühnpast, Mike Schmidt, Peter Schmett, Uwe Hapke, and Udo Walther. Like the International Military Tribunal, Judge Seidel is in a position to determine what that justice is because his side won in the struggle for unification. Judge Seidel's application of natural law to the former border guards is subject to the same question asked of Nuremberg: Is it anything more than victor's justice? Although East Germany voluntarily acceded to the Federal Republic of Germany, that accession was not clearly an acceptance of the natural law tradition of West Germany, as the abortion compromise demonstrates. If natural law bends to the needs of political compromise and practical necessity, it is difficult to see how it can justly be applied to individuals who are relatively powerless within the political system.

When a settled legal system exists, natural law can inform the content of the positive law; there need not be a conflict between the requirements of the rule of law and the requirements of natural law. However, when a society is in transition, as is German society where two very different legal and moral systems have combined, the conflict between natural law and rule of law is thrown into high relief. Unlike Judge Seidel, who emphasizes the precedence of natural law and exacerbates the tensions of transistion, Judge Tepperwein resolves the conflict between natural

law and positive law by stressing the moral element within the positive law. She accounts for the duress of the communist system by suspending the guards' sentences, but she does not hesitate to condemn their actions. Her reasoning, an analysis of East German law and the moral climate in which the border guards lived, is a better approach, one that will in the long run foster an increased respect for both law and justice within united Germany.