

2018

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Recommended Citation

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Schießbefehl¹ and the Issues of Retroactivity Within the East German Border Guard Trials

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History 499: Senior Seminar

June 5, 2018

On February 5th, 1989, 20-year old Chris Gueffroy and his companion, Christian Gaudin, were running for their lives. Tired of the poor conditions in the German Democratic Republic and hoping to find better in West Germany, they intended to climb the Berlin Wall that separated East and West Berlin using a ladder. A newspaper account states that despite both verbal warnings and warning shots, both young men continued to try and climb the wall until the border guards opened fire directly at them. Mr. Gaudin survived the experience after being shot, however, Mr. Guffroy passed away in custody while in an East German police hospital a few hours later.¹ Gueffroy was the last fatality of the Berlin wall before its opening nine months later.

An estimated 327 people lost their lives attempting to cross the border from East Germany to West Germany during the 28 years of the Berlin Wall, from its construction in August 1961 to its opening in November of 1989. These deaths occurred either at the Berlin Wall itself, or elsewhere on the inner-German border. This border separated the capitalist Federal Republic of Germany (FRG) in the west, from the communist German Democratic Republic (GDR) in the east, which were established after the fall of the Nazi regime at the end of World War Two. The inner-German border stretched from the northern border of Germany, to the southern border. Berlin was established as the East German capital, but as part of the initial agreement, the western half of Berlin was given to the Western Allies. When the Berlin Wall opened on the evening of November 9th, 1989, and the process of reunification began, the newly reunified Germany had to tackle several problems that came from the East and West split. To

¹ This is a German word that refers to the shootings at the Inner German Border during the time of strict separation between East and West Germany.

¹ Ian Johnson, "Berlin Wall Guard Given 3 ½ Years. Man Fleeing to West was Shot to Death," *Baltimore Sun*, January 21, 1992.

start was the fact that so many people had been killed while they attempted to travel illegally from East Germany to West Germany. The East Germans had been killed by the East German border guards, who had been given orders to shoot those trying to escape, but also by those who had given the orders. After the reunification of East and West Germany, the East German border guards were put on trial starting on September 2nd, 1991. At least four trials were held, each involving three or four guards, attempting to reconcile the East German deaths. The German leaders were eventually tried over a year after the beginning of the Border guard trials, in November of 1992, when Erich Honecker, the former leader of the German Democratic Republic was put on trial.

By holding East German border guards accountable to laws that did not exist in the former German Democratic Republic, the newly unified German courts unjustly pursued prosecuting these guards for the deaths of East Germans attempting to cross into West Germany. The border guard trials violated the Reunification treaty, and the West German Basic Law, article 103 which stated that “An act may be punished only if it was defined by a law as a criminal offence before the act was committed.”² The question of who was to blame for the deaths at the East and West German borders was the topic of much debate within Germany and led to trials of both former border guards and leaders of East Germany. Germans that resided in both East and West Germany believed it to be incorrect to try the guards for their actions under the East German regime. Legal writers from 1992 to 1999 who followed these trials debated their legality.³ Some of the German populace believe that the guards should be tried to the full

² *Basic Law for the Federal Republic of Germany*, German Bundestag, May 23, 1949, 89

³ Peter Quint. “The Border Guard Trials and the East German Past- seven arguments,” *The American Journal of Comparative Law* 48, No. 4 (2000): 541-572
<http://www.jstor.org/stable/840907>

extent of the law, while others thought it was not correct to go after such small actors in the grand scheme of the German division.

At the center of this set of legal questions and proceedings were the border guards. These special units conscripted into the East German military and specially selected for border guard duty, to serve as a first line of defense against the west, but also to stop those that would try to cross illegally from East to West Germany. The trials of the border guards highlight the issues of enforcing laws that were new to a land of a former state that no longer existed in October of 1990. The issues of retroactivity and the sovereignty of states came into question as well, as laws were applied where they had not existed before, and an outside state was producing judgement on the inner-workings of another.

Despite the wall being erected on August 13th, 1961, there was still a concerted effort by East Germans to immigrate by any means necessary to West Germany. With the opportunity of better economic development in West Germany, East Germany found that many of its skilled, and educated workforce was immigrating to the West. This amplified the already problematic economic situation within the German Democratic Republic. Though the rest of the inner-German border had been sealed off, one route remained, that of Berlin. East Germans were making their way to East Berlin, then escaping to West Berlin, and from there, finding transportation to West Germany. The hole needed to be plugged, and so under the leadership of Walter Ulbricht, the East German government erected a wall dividing Berlin in half, and surrounding the western half of the city on August 13th, 1961.⁴ The wall, it seemed, was erected overnight. East Germans were trapped, separated from friends and family, unable to circumvent

⁴ Mary Fulbrook, *A History of Germany 1918-2014*, 4th ed. (West Sussex: Blackwell Publishing Ltd, 2015), 162-163.

the wall. The East German government had already secured its border with West Germany, now the hole for East Germans to escape through in Berlin was plugged. The mentality behind establishing the wall had spiraled into a “deadly fortress mentality” that was emphasized by the leading communist party of the German Democratic Republic, and required more guards, and more extreme measures to secure the border between East and West.⁵ Erich Honecker, the successor to Ulbricht, tried to help quiet the unrest over the wall, both internationally and internally, but still continued setting up the East German fortress mentioned before.⁶ These actions involved the laying of mines, building of walls, and the conscription and selection of men to guard these stretches of territory from those who would try to cross illegally. These men were the East German border guards.

The scholarship that looks into these issues are generally newer as the cases for the border guards and leaders began in September of 1991 and finish in February of 2005. Over the course of a few months laws were changed, the economy and political system was changed for half of an entire country. The process was not a clean cut transition, but a tumultuous series of events that eventually lead to the reunification of Germany. The most available sources are legal articles that relate to the legal struggles of the German reunification. These articles were written during the time of the trials of the border guards, which do not end until the early 2000s. These articles were written by law professors from U.S. Law schools, and are very forgiving towards the Border guards of the now defunct communist regime of the GDR. Four books have been selected that speak to the challenges of the reunification of the GDR and the FRG, three of which

⁵ M.E. Sarotte, *Dealing with the Devil* (North Carolina: University of North Carolina Press, 2001), 125.

⁶ A.J. McAdams, *Judging the Past in Unified Germany* Cambridge: Cambridge University Press, 2001, 13.

look at reunification as a whole, and then one that looked more specifically at the legal issues of the reunification.

One of the central issues with the trials of the border guards was their over-all legality. Peter Quint, a professor of constitutional law at the University of Maryland school of law, looked into the legality of these trials. Quint's article is a revised form of a lecture that he gave in October of 1998, Quint laid out seven arguments that were being used within the trials of the border guards. The arguments were the issue of retroactivity, the knowledge of guilt, general knowledge of wrongdoing should over-ride law and order, principles of international law, the reinterpretation of prior law, violation of prior law, and the disregarding of the retroactivity law. In his article, Quint argues that unified German courts have interpreted "GDR law according to principles that seem more consistent with West Germany legal theory than the theory actually employed in the GDR."⁷ He starts with looking at the idea that he calls the "Radbruch Formula" which he names after a German legal philosopher by the name of Gustav Radbruch. The idea was that a society should not retro-actively charge people for crimes, that is, charge people for actions that were not illegal at the time they were committed, but were at the present time. Quint gives the example of the Nuremburg Trials as something that was retro-actively done. Quint argues here however that the numbers and intent in the case of these border guards pales in comparison to something of such a large item as the Nazi regime and the Holocaust. By trying to compare the millions killed with full intention of the Holocaust to be compared to the hundreds to maybe 1000 individuals killed as a last resort leaves one to think that maybe bending

⁷ Quint, 542-543.

the rules found in the German constitution of non-retroactive punishment is out of line for these cases.⁸

The Radbruch formula fits in well with the ideas laid out in an article by *The Economist* in March of 1996, looking back at the claims of members of the political leadership of the GDR that the laws which they were being tried under did not exist in East Germany. If the laws did not exist, it could ultimately grant the Generals and political officials a sort of Amnesty for the actions that were taken under the GDR.⁹ Quint pays attention to both sides of the argument in his article, and not just promoting his own ideas and ignoring what others have said in opposition to his analysis of the trials.

Secondly Quint discusses the potential of the guards having knowledge that what they were doing was wrong. Quint discusses the idea that the guards knew what they were doing would result in some form of punishment later if they followed through with their orders to kill those attempting to reach the West. He points to the large amount of steps taken to conceal these incidents from the Eastern and Western German public as evidence to the idea that the guards were scared of the repercussions of their actions.¹⁰ Quint, though, proposes that the myriad of steps would be a better argument against the leadership of the GDR, as the guards would be more pawns of the situation, instead of the main contributors for the deaths.¹¹

The guards were set up for failure in a way that left them looking like the ones solely responsible for the deaths at the East and West German border. In a 2011 article by Jochen

⁸ Quint, 545-546.

⁹ "No law, no justice: Germany." *The Economist*, 9 Mar. 1996, p. 51+. *Academic OneFile*, Accessed 12 Feb. 2018. http://link.galegroup.com/apps/doc/A18076043/AONE?u=oregon_western&sid=AONE&xid=9949ab64.

¹⁰ Quint, 549.

¹¹ Quint, 550.

Maurer, and Gerhard Sälter about the functions and militarization of the East German Border Guards. Gerhard Sälter is a historian and head of the department of research and documentation for the Berlin Wall Memorial, having many other publications about East Germany and the Berlin Wall. Jochen Maurer is a company commander for officer candidates at the University of Bundeswehr in Hamburg Germany. The Bundeswehr is the German armed forces. Sälter and Maurer's argument is founded on interviews with former East German border guards, as well as documentation detailing the training and equipping of the border guards. These sources support Sälter and Maurer's thesis that the high inter-German border fatalities were related to the more militarized nature of the GDR border guards.¹² By being placed under military control they were given training and equipment that was not suitable for stopping individuals or small groups from crossing the border, but for tasks similar to fighting a war.¹³ Sälter and Maurer showcase how the East German Border Guards were not made into an effective policing force, but a force that is viewed more as a "...first line of defense..." by the Warsaw pact between the GDR and the U.S.S.R.. But in reality these guards were used to stop East Germans from attempting to cross into West Germany.¹⁴ These men were specially selected, and then indoctrinated with theories of defending the GDR. The guards were the last line of defense against dissidents and defectors that could deface the GDR by showing its economic and societal shortcomings on an international scale.¹⁵ There were also encouragements, and rewards, such as a bonus, or promotions, for not allowing defectors through, as well, propaganda was spread to the troops that they were to use their firearms if nothing else was working.¹⁶ Also, guards were taught that

¹² Maurer, 23.

¹³ Maurer, 28.

¹⁴ Maurer, 29.

¹⁵ Maurer, 35.

¹⁶ Maurer, 33.

securing state order was more important than that of an individual's life.¹⁷ These guards were acting within the law that they were taught by the leadership of the GDR.

However, an interesting question is raised in the terms of enforcing laws in how that is to be done. When enforcing a law, interpretation is everything, and the question is how does one interpret the laws coming from the German Democratic Republic? In his article from 1998, Manfred J. Gabriel looks at the laws, and cases surrounding them, that have to do with the deaths of East Germans attempting to leave the GDR outside of the legal means. Gabriel has his Juris Doctor degree from the University of Munich, and is an attorney-at-law in Germany. Gabriel's argument is that the law dealing with shooting those attempting to defect is "far from clear... And even if East German law condoned the killings we should hesitate to show deference to institutional injustice."¹⁸ Here Gabriel talks about the lack of former East German representatives in the court system after the reunification of Germany. Lawyers and Judges that had served within the GDR were replaced and had to be retrained to match the operations of the FRG. New officials, from the FRG, came in with Western legal philosophies, which changes interpretation of the laws of what could almost be described as an entirely different culture. An entirely different set of laws, and societal ideals were in place within the GDR than that of the FRG. Gabriel discusses two different perspectives of law, the observer and participant, and defines what each of these means within the context of the GDR and FRG reunification. The observer chooses what to see in this, looking at the different pressures of society on the guard, the situation at hand, or the intentions behind the guards actions.¹⁹ The participant perspective,

¹⁷ Maurer, 35.

¹⁸ Manfred J. Gabriel, "Coming to terms with the East German Border Guard Cases," *Columbia Journal of Transnational Law* 38, 375 (2000) 378.

¹⁹ Gabriel, 390.

which the new judges used, takes the laws as they are written, and as it believes they would have been interpreted, in a way completely irrelevant to the state. The courts decided, the participant perspective would give the guards a guilty sentence.²⁰ Gabriel looks at the differences between the GDR and the FRG pointing to the potential of unfair legal decisions being made. He uses a specific case from 1992, where a guard and the officer above him were sentenced for a year and a half,²¹ but Gabriel also references other trials, to further back his claims. The main case used is one of the death of a twenty year old man named Michael, who was shot for attempting to escape in 1984, and would have survived had he gotten medical help within a reasonable amount of time, versus the two hours it took for the ambulance called to arrive.²² Gabriel's article also gives the specific laws of which it references, various sections of the East German penal code that lay out when deadly force may be used, what constitutes a felony in terms of the borders, and the punishments for attempting to illegally immigrate. Gabriel then describes the difference between the local, and supreme court decisions.²³ The views of the interpretation of the law are mirrored in Quint's arguments as well, that interpreting laws under a different context than when they were enacted does not change the legality.²⁴ They agree on the subject, however Quint's argument is significantly shorter for this method of dealing with the German border guards.

Amongst the debate and turmoil about the border guard trials, a very distinct comparison was continuously brought into the discussion, that of the Nuremberg trials that had occurred some 50 years prior. The question of "were the guards just following orders?" is a comparison to that of the defense of Nazis in the Nuremberg trials as well. Here Micah Goodman lays out a list

²⁰ Gabriel, 392.

²¹ Gabriel, 385.

²² Gabriel, 384.

²³ Gabriel, 391.

²⁴ Quint, pg. 556

of differences between the situations of the Border Guard trials, and those of the Nuremburg Trials in his article from 1996 “After the Wall: The Legal Ramifications of the East German Border Guard Trials in Unified Germany”. Goodman holds his J.D. in Law from Cornell law school. The Nuremburg trials were a popular point of reference for people interested in the border guard trials when looking at the morality of the actions of the German Border Guards. But, Goodman describes that, as a plea, “I was just following orders” did not hold water in the courts of the Nuremburg trials, but that did not mean that it couldn’t for the border guards.²⁵ Goodman is also quick to point out that the Nuremburg trials were centered around the top officials of the Nazi regime, whereas the Border Guard trials were seemed to be focused on the “junior functionaries”.²⁶ This article is looking at the differences between the Nuremburg and the Border Guard trials more detailed manner than other articles, breaking them down point by point to show the differences. Goodman is arguing that the actions of the guards were legal, and therefore should be treated as such because they were given by the upper officials. As well, the inclusion of quotes from border guard manuals, Honecker, the leader of the GDR, the immigration laws of the GDR, and former guards also gives a good backing to the claims being made. Goodman’s article also gives good insight into the mentality, along with the aforementioned Maurer and Sälter article, of the Border guards, and some of the pressures that they faced. This article also gives a solid background to the events as a whole, bringing in events that lead to the reunification of Germany, such as the political protests of May, 1989, protesting the communist party’s garnering ninety-nine percent of the vote for the last thirty years, and then the issues of combining two different societies as well.

²⁵ Micah Goodman, “After the Wall,” *Cornell International Law Journal*, vol. 29 (1996) pg. 743

²⁶ *ibid.*

Within the combining of these two different states, the selection of judges to interpret laws, and give verdicts on cases was an important factor in setting up the newly Unified Germany. So far, the discussion has centered around legal questions and legal debate, however, the discussion of how the legal system was put together in this newly unified Germany is still to be broken down. Michael Bohlander expressed some warnings, looking from the outside in as a law professor in England, to the process of selecting and refining those who were to be a part of the judiciary units in the newly unified Germany in his article “United We Stand: The Judiciary in East Germany After the Unification” written in 1992. Bohlander is a Professor of Law for Durham Law School at Durham University. He was also a judge during the transition stage, from when the reunification treaty was signed in August of 1990, to when it was implemented within East Germany on October 3rd, 1990. In his article Bohlander described the necessity of bringing those that supported the system of the tyrannical communist state, by condemning those with differing political views to the state, should be weeded out.²⁷ However he makes the important distinction that both good and bad judges will be selected, and that these lead to tensions within the reunification process.²⁸ Bohlander also describes there needs to be a distinction made between those judges that did not support the socialist regime, but played along with them out of self-interest to keep their positions and livelihood, doing as little damage as they could.²⁹ These offer important insights into what went into selecting judges that would have an impact on the border guard trials. Outlining the different selection processes of the two different systems for appointing judges, Bohlander looks at the GDR constitution, and compares

²⁷ Michael Bohlander, “United We Stand: The Judiciary in East Germany After the Unification,” *Anglo-American Law Review* vol. 21 (1992) pg. 415-416

²⁸ Bohlander, 416.

²⁹ Bohlander, 417.

it with how judges of the FRG are appointed. As well, the reactions by the lawyers on both the GDR, and the FRG judiciary systems have an opportunity to weigh in on decisions and treatment.³⁰ Bohlander then delved into the ideas of how the judges were selected, by committee made up of delegates from German states' parliaments, and members of the judiciary.³¹ Looking at the selection of judges and how those choices would affect the trials has not been mentioned in the other sources. The reliance on western judges in interpreting the East German laws, and handling the trials of the East German border guards creates a bias against the guards, and the system that they served.

German reunification is not something that came quickly or easily, but after a series of debates and meetings, attempting to settle the differences and the implications of two different states coming together. There are many works written in regard to this, and four have been chosen to look at the complications of reunifying East and West Germany. To start is the work of Mary Fulbrook in her book *A History of Germany 1918-2014*. Fulbrook is a professor of German History and the Dean of the Faculty of Social and Historical Sciences at the University College London. In her book Fulbrook argues some of the reluctance to the reunification in East Germany stem from members of the former GDR hoping for a return of some of the things they liked about the GDR.³² There is also the issue of what the role of this newly unified Germany will be on the international scale, which involved joining the European Union, and replacing the former Deutschmark with the Euro.³³ Fulbrook's overall implication of the reunification is a time of great confusion, and that of some loathing, as the citizens of the now defunct East

³⁰ Bohlander, 419.

³¹ Bohlander, 422.

³² Mary Fulbrook, *A History of Germany 1918-2014* (West Sussex: Blackwell Publishing Ltd, 2015), 292.

³³ Fulbrook, 290.

Germany, felt like “second class citizens”. Many Germans also felt uneasy given a rise in nationalism, and xenophobia that seemed to be gaining traction within the German state again, harkening back to when the Nazi Regime ruled the country.³⁴ Germany, according to Fulbrook was full of anxieties at the time of reunification, and though many were glad, many more were cautious at the possibilities of this newly unified state.³⁵ Fulbrook’s arguments have largely to do with a social aspect, giving a view into the lives of the general populace and their reactions to the new Germany. Fulbrook’s text is focused on a general history of the German state during the 20th and 21st centuries, and so greater detail is not given on the issues of reunification. Fulbrook’s work lends itself to a good, general understanding of the time period, and some of the basic elements that followed, and Fulbrook gives reference to texts that speak to German reunification in greater detail.

The East and West German reunification happened faster than anyone thought was wise, given the amount of economic, political and social changes that needed to be made. Konrad Jarausch’s book *The Rush to German Unity*, published in 1994, is one text that Fulbrook makes reference to that covers the issues of the speed at which the German reunification occurred. Jarausch is Lurcy Professor of European Civilization at the University of North Carolina, and has further publications such as another used in the study of this topic *Uniting Germany: Documents and Debates, 1944-1993*. Here Jarausch argues that German reunification was taken on and implemented too quickly, and that Germany was to be plagued by internal issues of unity from the gathering of two different societies. Jarausch also discusses the goals of both the FRG and the GDR in their hopes to bring about a unified Germany. The GDR wanted a communist state,

³⁴ Fulbrook, 279.

³⁵ Fulbrook, 280.

and the FRG wanted a democratic state.³⁶ The root cause of many issues, Jarausch claims, had to do with the fixing of the former German Democratic Republic's economic decline.³⁷ There was a need to raise German funds to help the Eastern half of the country, however, the current West German leaders had promised to not raise taxes for reunification. Along with other blocks to the reunification, such as the restructuring of East German institutions, many east Germans were left unemployed due to their connections with the past regimes.³⁸ As well, with unity, came Germany's own national sovereignty and responsibility for its actions.³⁹ Germany decided to help other nations in conflicts, with economic means or political support.⁴⁰ Placing German unity in an international context, and the reactions of other nations to the newly unified nation is helpful in understanding the global context of this nation. Germany was at the forefront of the cold war and the division between capitalism and communism. Jarausch almost completely overlooks any sort of legal struggle however, discussing more about the social aspects, rather than truly delving into specific policies that were laid out, giving at best brief definitions of what is there.

Gert-Joachim Glaessner's book *The Unification Process in Germany* published in 1992, explores the social divisions that came with the German reunification. Glaessner is a Professor of Political Science and Director for the Political Science Institute of Humboldt University in Berlin. Glaessner discusses that the reunification of Germany marked "the beginning of a long

³⁶ Konrad Jarausch, *The Rush to German Unity* (New York City: Oxford University Press, 1994) 203

³⁷ *ibid.*

³⁸ Jarausch, *The Rush to German Unity*, 204.

³⁹ Jarausch, *The Rush to German Unity*, 205.

⁴⁰ Jarausch, *The Rush to German Unity*, 206.

and arduous process through which they [the FRG and the GDR] will grow together.”⁴¹

Glaessner argues that without the mandate of the German Basic Law, which called for German self-determination and Unity, established by the FRG in 1949, that the people of the FRG may have never actually demanded the reunification.⁴² The idea here is due to the fact that the two states were so different, that reunification seemed something of a ridiculous idea, but it had been made an important enough priority to include in what would become the constitution for the unified state. Another point that Glaessner makes is that the GDR could not keep its economy at a level that allowed for the continuation of a healthy society. The East German government could not gain legitimacy by this and the societal crisis that this created helped lead to the overthrow of the GDR when the elections, and decisions for reunification came about.⁴³

Glaessner takes a very social historical approach, looking at the public reactions, as well as a political approach looking at how the political parties, especially in East Germany, attempted to keep their control over the general public. A weakness of Glaessner’s text is the extreme focus in on the East German society and how it will affect reunification, giving minimal credit to West German thought about the process or reunification. The last three sources however have not looked at the legal issues of the reunification of Germany however.

Discussion of the legal battles of bringing what was called a dictatorship to an end is found in the text of A.J. McAdams book *Judging the Past in Unified Germany* published in 2001. McAdams’ legal historiographic approach is key in understanding the legal processes of the German reunification. McAdams is a Professor of Government and International studies for

⁴¹ Gert-Joachim Glaessner, *The Unification Process in Germany* (New York: St. Martin’s Press, 1992), 3.

⁴² Glaessner, 4.

⁴³ Glaessner, 34.

the University of Notre Dame, and has authored a few different books on the subject of the East and West German split. In the terms of bringing about legal justice, McAdams highlights the reunification process of Germany as one of the few states that transitioned governments during this time period which actually pursue justice for past actions. Other states that had ousted communist governments actively avoided the legal issues, and making the moral decisions, but Germany dove in head first.⁴⁴ McAdams backs up this claim of Germany tackling the legal issues and dealing with the past. McAdams presents the numbers of some 62,000 cases that were reviewed, and over 1,000 indictments issued by FRG officials in reviewing the actions taken by East German Communist party, state officials and the East German border guards. Included was the dismissal of many past public servants that were deemed to have abused their powers within the position during their time within the GDR.⁴⁵ The legal actions and dismissals were mainly against those that had worked for the state secret police, or Stasi.⁴⁶ Other arguments that McAdams makes is that FRG officials attempted to circumvent the issues of retroactively trying someone for their crimes. In order to prove the actions, particularly of the former East German border guards and their superiors, were illegal under the rule of law within East German society. Attempting to bring judgement by their interpretation of East German law did not work.⁴⁷ The strengths of McAdams' work lies in the fact that he backs up his arguments with primary sources such as legislation, and interviews with major political players during the time of the East German reunification. McAdams' book is the only one that provides a clear opinion on the legal issues, and actions that the new German nation had to take in order to deal with its new past, and

⁴⁴ McAdams, 1.

⁴⁵ McAdams, 2.

⁴⁶ McAdams, 19.

⁴⁷ McAdams, 25.

the deaths of those that had attempted to escape the GDR. He places his analysis in the context of the reunification as a whole. Some weaknesses are that he does not take into account the public's reactions to these different instances, only looking at the legal declarations that are given.

Through these secondary sources there is a heavy reliance on the verdicts of the trials of the border guards, as well as the written laws of both the FRG and the GDR. The trial transcripts however are not the main sources that are being used, though some comments from them are used. In most instances the fact that the trials happened is a source in itself, and then these legal sources are pulling from laws, and other legal philosophy, to discuss their opinions of the legality of these trials. Peter Quint's arguments against retroactively trying the guards in dealing with the East German past shows the disapproval of trying the guards without a law that made their actions illegal. Maurer and Sälter's article about the East German border guard shows that they were tasked mainly to do police work, but were trained and outfitted as a combat unit, increasing the chances of killing East Germans that attempted to flee to the West. Manfred Gabriel's article discussing the lack of East German representation within the trial system, allowed an unjust amount of bias into the trials. Micah Goodman looking at the comparison between border guard trials and the Nuremberg trials as a far-fetched comparison, both in numbers, and in intent of harm. Michael Bohlander discusses the system of selecting judges in the newly unified Germany, and how the transition of the reunification threw off the legal system, hindering the ability to make proper legal decisions. These secondary sources point towards a legal system that is not ready to address the issues of the deaths that occurred at the inner-German border, and has decided to do so unjustly by retroactively charging the East German border guards with the murders of the East Germans that had attempted to flee to West Germany.

The primary sources used are news articles detailing several of the East German Border Guard Trials. These articles come from American and German news sources, detailing the hearings as the trials happened. This will connect well with the legal articles mentioned above, as a question through all of them is whether or not it is right to be trying the border guards as if they had done everything singlehandedly. These reports also highlighted some of the atrocities committed by the GDR during its time intense separation from the FRG.

The German Unification Treaty will come in handy, looking at the agreements between the two regimes, especially in the instance of law enforcement will help point to attitudes taken up with legal cases. The treaty details the reunification of Germany, discussing that Berlin was to be the capital, and setting up a new public holiday, October 3rd, as the “Day of German Unity.” An important point to note in the treaty is Chapter 3, article 9. Here it states that “Law of the German Democratic Republic valid at the signing of this Treaty...shall remain in force in so far as it is compatible with the Basic Law”. In addition to the treaty, the mentioned Basic Law of the German Democratic Republic which was brought into effect in 1949, was used as well to help point to the new legal actions taken within the former German Democratic Republic. The treaty also proved helpful in understanding the context in which the judges, who as was mentioned were largely western, entering the trials had come from.

Other official documents as well, from speeches to treaties that point to the differing viewpoints on the issues of reunifying the German state. These documents and speeches are coming from a book of compiled sources dealing with the unifying of Germany from 1944-1993. Compiled by Konrad Jarausch in 1994, *Uniting Germany: Documents and debates, 1944-1993* contains many primary sources, as well as a small intro to each and the significance that they carried. This volume also contains Honecker’s defense of his actions which will be important,

though he was never officially sentenced, Honecker was tried, and his arguments make for a good look into the idea of these trials. As well, the international treaties that now recognize the single, unified Germany will show what is to be expected, and how the new German state will be treated from there on, being recognized as a sovereign, single state.

Through looking at the debate of legal terms on the local, and international level, as well as reactions of law professionals to those debates, the question of the legality of the trials is apparent. The border guards that were tried eventually all ended up being acquitted of their charges at the supreme court level, giving more credence to the idea that they should not have been tried. These primary and secondary sources come to show that the trials were not entirely unethical, but should have been carried out in a different manner in order to charge the correct people for the correct offenses. The FRG officials' goal was to bring those responsible for the deaths of the estimated 327 lives⁴⁸ lost at the border between East and West Germany, to justice. The issue is, documentation does not point to the guards being at fault, except in some extreme circumstances, but the leadership which went untried, in some instances not until the late 1990s or early 2000s, or in the case of Honecker, never really at all.

After the fall of the Berlin wall on November 9th 1989, and German reunification seeming like a greater and greater reality, a plan had to be made on how these two very different states would come together. After months of negotiation, the East and West German governments managed to create a treaty that signaled the end of the split within Germany and brought in a new era of German unity. The reunification treaty however did not only impact Germany, but all of Europe, and had a worldwide presence as well, given the representatives from the United States, the Soviet Union, France, and England were also present and weighing in

⁴⁸ "East German Border Claimed 327 Lives, Says Berlin Study" BBC News, June 8, 2017.

on the treaty. The treaty was finalized on August 8th, 1990, and for many marked the end of the cold war between the United States and the Soviet Union.⁴⁹

Within the treaty it states that reunification will take effect on October 3rd of the same year, and Berlin will once again be the capital of Germany in its unified form. At the end of the first article of the treaty, a national holiday was introduced for the unification day, October 3rd, to be a public holiday celebrating the end of the division. Then coming out of the treaty, on the accession of unity, the Basic Law of West Germany came into effect within the states of what was the former German Democratic Republic, with some amendments to account for the new members within Germany. The Treaty repeals article 23⁵⁰ of the German basic law, and adjusted several others. Laying out how debts were taken up by the government of the Federal Republic of German⁵¹, and the privatization of industry within the East⁵². In all instances as well, the Unification Treaty laid out the taking over of all governmental functions by the Federal Republic of Germany.⁵³

Within the treaty itself is also the laws that will be followed by the unified state, the Basic Laws, that West Germany had laid out in 1946. The FRG was picked up responsibilities of the East German government on the third of October; includes the aforementioned debts, East German treaties the government held with other nations would be reviewed, and reworked in

⁴⁹ “East and West Germany Reunite After 45 Years” History, published 10/03/17, accessed 05/02/18, <https://www.history.com/this-day-in-history/east-and-west-germany-reunite-after-45-years>

⁵⁰ Article 23 lays out the system of interacting with the European Union, and how to best represent the interests of Germany within. The repeal of this allows the European Union to be able to take more control in situations where it is deemed necessary, and gives greater power to the representative of Germany for the European Union.

⁵¹ “The Unification Treaty” in *German History in Documents and Images* 10, One Germany in Europe, 1989-2009, 6.

⁵² “Unification Treaty”, 8.

⁵³ “Unification Treaty”, 1.

accordance with the accession of East into West.⁵⁴ The importance of this is that at the accession, all laws that will be enforced, besides a small number of specific East German laws, came from the FRG's basic laws. In Article 103 of the Federal Republic of Germany's basic law it states that "An act may be punished only if it was defined by a law as a criminal offence before the act was committed."⁵⁵ Here, the application to the East German border guard trials comes from the statement itself, that there had to be a law for a criminal charge to be given. The FRG was unable to find a law that was applicable to the border guards. There were no laws as such, in fact, laws to quite the opposite effect within East Germany that the guards could be tried under in this instance since the laws of the FRG did not apply to the GDR until the accession. Nothing within the unification treaty speaks to the possibility of punishing East Germans for the crimes that have been committed, but was focused on the future, and bringing the German nation together to move forward in benefitting Europe. None of this was possible without the collapse of the Berlin wall.

When the time for the Berlin wall to come down finally came, and German reunification was inevitable, it became clear that a lot of careful work was going to be necessary to join the two states back together. In light of the Berlin wall opening on the 9th of November, 1989,⁵⁶ Brandt gave a speech in front of the Schöneberg Town hall, in Bonn Germany on the 10th, the evening after the opening. Willy Brandt was the former chancellor of the Federal Republic of Germany, and the head of the SPD, a major political party within West Germany. Brandt's efforts as foreign minister, from 1966 until 1969, then chancellor from 1969 until his stepping

⁵⁴ "Unification Treaty", 5.

⁵⁵ "German Basic Law", 89.

⁵⁶ Fulbrook, 269.

down in 1974, in what was called *Ostpolitik*, or “eastern policy” made large gains in western communication with the Soviet Bloc, especially East Germany.⁵⁷

Brandt, in his speech, talked about how much has been overcome to get to the wall to come down, but how there was still much to do, and the importance of how Germany, both East and West, handles this new reality for them. Brandt pointed out the uncertainty as the two Germanys come together, saying “...no one should act as though he knew exactly how the people of the two German states will come to have a new relationship with one another.”⁵⁸ In a change of tone, Brandt looked at the changes coming to East Germany, with the now open exposure to the consumeristic society of the West. Brandt also sees an importance of keeping up a section of the wall as memorial and reminder of the terrible past of Germany, along with the wreckage of the Kaiser-Wilhelm church destroyed during World War II. Brandt then again described the uncertainty, and the incomprehensibility of the context of which the German people lived. In another switch, he blamed the division of Germany, and that of Europe, on the German past, by allowing the “terrorist Nazi regime and the war it unleashed.”⁵⁹ The division was furthered when the victorious powers also did not hold unity in means of ending the war, talking of the split between France, Great Britain, and the United States, opposing the Soviet Union. Brandt closed this section of the speech with the announcement that the President of the United States, George H. W. Bush, and the leader of the Soviet Union, Mikhail Gorbachev, would meet on the Island of Malta to discuss the new terms of the two Germanys. Willy Brandt recognizes though that this would not be a quick process of reunification, but one that will come

⁵⁷ “Now what belongs together will grow together” Willy Brandt Biography, accessed 4/23/18, <https://www.willy-brandt-biography.com/politics/german-unity/>

⁵⁸ Willy Brandt, “Growing Together” in *Uniting Germany: Documents and Debates, 1944-1993*, edited by Konrad Jarausch, 80. Oxford: Berghahn Books, 80.

⁵⁹ Brandt, 81.

slowly. Brandt made this apparent when in his speech he states “We are guided by the common conviction that the European Community must be further developed and the division of our continent slowly but surely overcome...”⁶⁰

Here Brandt is gave both exaltations, and a warning. Brandt was excited about the prospect of the German reunification, but he understood the risk and importance of how the next round of negotiations were handled. Brandt is pointing to how the reunification of Germany will have major impacts on all of Europe, and the divide that it has been under since the end of the second world war. It is understood that it is hard to comprehend the importance of what has happened in its truest form when he says “Certainly it is not always easy for those who are still young and those coming of age to understand the historical context in which we [the German people] live.”⁶¹ It is important to note that Brandt sees the slow movement of progress of the reunification as a very important as mentioned in the last sentence of the preceding paragraph. Brandt knows this will not, and cannot, be a fast process. Which was definitely the case when it comes to creating the German Unification Treaty, some nine months after the wall came down.

Though there does not seem to be any access to the actual trial transcripts, at least a few of the trials of the East German border guards and their superiors were covered by newspaper articles with some great interest. News coverage of the border guard trials addressed their legality. Articles from the *New York Times*, *LA Times*, *Chicago Tribune*, and *Deutsche Welle* have covered a few of the trials, as well as opinions surrounding the trials as they progressed. The trials began some 11 months after the signing of the reunification treaty and opinions were very divided on the issue according to an article by Stephen Kinzer found within the *New York*

⁶⁰ Brandt, 81.

⁶¹ Brandt, 80.

Times. The trials of guards and officials would not end until 2004, when the final verdict of a former leader of the German Democratic Republic was given.

The first trial was that of four former border guards of German Democratic Republic happening in Berlin on September 2nd, 1991. These four guards, were accused of the death of Chris Gueffroy, a 20 year old man who had attempted to flee to West Germany in February, 1989. The guards were also charged with the wounding of Christian Gaudian, friend of Gueffroy, who was with him attempting to emigrate from East Germany to West Germany. Along with the these guards' trial, allegations were being collected for some 300 other members of the former German Democratic Republic.⁶² The first trial lasted until January of 1992, a five-month ordeal that met one to two times a week for that time, until a verdict was given. Heinrich was sentenced to three and a half years in prison for manslaughter, having had been judged as the one who fired the fatal shot that killed Gueffroy. Kuhnpast was given a two year suspended sentence for attempted manslaughter and the other two guards were released when the judged ruled that they “. . .did not kill and did not intend to kill. . .”.⁶³

Within the title of his article from September 3rd, 1991, Tyler Marshall, a writer for the Los Angeles times, even poses the question “Can border guards be punished for shootings at wall?” within the title of the article. Marshal's article discussed the legal issues of the trials and the possible ramification of the first one a day after it has begun and what it may mean. Here, Marshall asks the questions of if it is right to charge these guards for that which was considered to be legal under the East German law. Marshall is covering the same trial as Kinzer in this

⁶² Tyler Marshall, “Berlin Test Case: Can Border Guards be Punished for Shootings at Wall?” *LA Times*, September 3, 1991.

⁶³ Stephen Kinzer, “2 East German Guards Convicted of Killing Man as he Fled to West” *New York Times* (New York, New York) January 21, 1992, sec. 1A, p. 1.

instance, but is focusing on the bigger questions within. According to the article, all four of these former guards had plead not guilty on account of following orders. These orders being to stop, by any means necessary, those trying to illegally leave East Germany which could include the use of deadly force. The largest potential prison sentence was about fifteen years for each of these four border guards, and the defendants are described in the article as “looking lost and uncertain.” Like Kinzer, Marshall expected that the verdict of this case will have a major influence on the trials of some 300 members of the German Democratic Republic.

However as stated in the article, much of the German populace were discontent with the idea that the guards are the first to go on trial, an idea brushed aside by the courts with a simple acknowledgment from German officials that they were “...pursuing more responsible individuals, too.” The phrasing within that appears to be an acceptance that there are people higher up that need to be tried, but does not seem to answer the possible injustice of holding these guards accountable for the mistakes of their entire government. Marshall furthers his point within the article when he mentions that the only East German leader to be tried in any way, a trade union leader from the GDR, had walked freely after his trial. The GDR official was Harry Tisch, a former head of the Communist Labor union, having been charged with the misappropriation of funds in February, 1991. Tisch was sentenced to serve 18 months in prison, but had this waved due to his having spent 14 months in pretrial detention.⁶⁴ With knowledge of only one leader from the former GDR being tried and released quickly, the courts are not picking the right individuals to prosecute within the former East German government. Marshall, at the end of the article pulls in a quote from a former East German border guard that is not on trial,

⁶⁴ Eric Page, “Harry Tisch, 68, Former Leader of East German Labor Unions,” *New York Times*, June 19, 1995, sec. D10, p. 48.

Lutz Rathenow, who states that "...they [the GDR officials] tried to keep us constantly ready to kill."⁶⁵

The trials beginning only 11 months after the German reunification, gives it an almost witch-hunt sort of feeling. The court system appears to have been scrambling to find anyone that they could place blame on for the deaths of East Germans trying to reach West Germany. The unrest, and dissatisfaction with the identity and position of the defendants points to the mislabeling of blame. The question of where the former East German officials that actually gave the order to shoot were in these trials shows that the German people did not blame the border guards, but those that were in charge of them and their policies. With the hastiness of this trial, though maybe not in actual length but within the amount of time since the German unification, it seems it would have been better for the administration of the newly unified Germany to step back and process who the proper culprits were. There of course was initial West German public outrage at the shootings of those trying to immigrate from East to West Germany, and this is what seems to have been grabbed onto by the German courts. However, once reunification had happened, the former West German populace seem to have taken a step back, and do not lay the blame entirely on the guards.⁶⁶ In such recent German history, the Nazi trials, which started off by prosecuting the leadership, and then working its way down the chain of command was entirely flipped with these trials. In this sense the whole idea of justice was being ignored, as those at the low end of the ranks within the former East German border guards were being singled out at the very beginning. Then, the issue of Rathenow's statement, of the officials having kept the guards ready to kill, especially through coercion, and fake stories and reports, the

⁶⁵ Marshall, "Berlin Test Case".

⁶⁶ Marshall, "Berlin Test Case".

people would find it hard to blame the guards for their actions when they themselves were scared for their lives by the stories their superiors told them.

In an opinion article from the *New York Times* On September 30th of the same year, Peter Schneider, from Germany, gave his views of the border guard trial that was discussed within Tyler Marshall's article. Peter Schneider is a German author that wrote about life after the Berlin wall had come down, and his article was translated from German and put into the *New York Times*. A point of interest in the beginning of the article is the fact that the border guard trials were beginning almost exactly at the same time that the last trial of a Nazi leader was starting.⁶⁷ In his article, Schneider gives good insight to the major opinions of the German people in regards to the trials while they are going on, and that there was a definite divide of support or opposition of the trials for the border guards. Schneider viewed the trials as a small drop in the great sea of issues to be unraveled within the former East German regime in order to give proper justice, that there is more to the set-up of the orders that the guards are following than just a "shoot-to-kill" directive.

The German people who supported the trial were basing their views off of the idea that there are international legal norms that outweigh whatever the East German Law may have stated. Those that opposed the trials felt that it was not okay to go back and charge retroactively for things that were legal under a past law system. In his article Schneider asks the same question as Marshall "...does the legal system of the Federal Republic⁶⁸ have the authority to pass judgement on the crimes of the German Democratic Republic?" Ultimately Schneider does

⁶⁷ This was Josef Schwamberger, a concentration camp commandant for the Nazi party. From: Peter Schneider, "Facing Germany's Newer Past" *New York times*, September 30, 1991. Sec. A17, p. 17.

⁶⁸ That is West Germany

not think so, but he is sympathetic to the German people who think West Germany should pursue the guards. Calling the trial “unfortunate and misguided” Schneider claims however that the legal system within Germany was not up to the task of the trial at hand, and that those who were being tried should not fear the verdict to come. Schneider also pointed out that the German people are working on sympathizing with the guards, with statements such as “no one can pass judgment who hasn’t been in the same position.” Here, the people that Schneider has referred to were even saying that people have no idea how they would have acted within the same circumstances. That being said, it would seem that this would point to the necessity of delaying the trials in order to ensure that the court system is ready to take on cases of this sort. This considering that the German unification treaty was less than a year old at this time, and that the Nazi trials were ending more than 40 years after they began. Schneider does however feel that there needed to be something done, it does not have to be court trials, but some form of justice, and at least the correct labeling of responsibility for those that perpetrated these deaths.

Here again, the trial and the speed at which it was brought into motion is being questioned. Schneider, like other article authors, points to clear frustration of the German people with the trial being focused on the border guards that were merely doing their jobs. Looking at both the support and opposition for the trial helps lay out what the different arguments either for or against this trial were. It is important that both sides, for and against the trials, are covered in Schneider’s article. Schneider seems to agree with the Marshall, in the fact that the trials were going after the wrong people, especially when he uses a phrase like “unfortunate and misguided” to describe them. Bringing in the information about the last Nazi trial is something of note as well. There is in very recent memory a series of trials that worked in a completely different way than how the trial covered in Marshall’s article and the other trials to come are being set up.

Here, Marshall indirectly compared the trials that are operating off of the same principle, of prosecuting the orders that were given, but in entirely different ways, from going after those that gave the order, to those that followed. But where were the leaders that gave the orders in these trials? If the Nuremberg trials were any base of comparison, the leaders of the East German government, that had given the orders, should also be held accountable to their actions. One character especially stood out from this group, and that was Erich Honecker.

As was previously seen within the border guard trials, one major question stuck out amongst all of the debates surrounding them, where were the ones who gave the orders? The head of the state at the time of the German Reunification was Erich Honecker. Honecker had come to power in East Germany in 1971 replacing the former leader Walter Ulbricht.⁶⁹ During the reunification in East Germany, Honecker was removed from power in an attempt to appease the citizens of East Germany, but it was too little, too late. When the Berlin Wall came down shortly after, and the inner German border was opened, East and West Germany was reunited freely for the first time since the wall had been erected. Upon Honecker's removal, he and his wife went into hiding, and when the two Germanys were united officially, and the call for his arrest was issued, Honecker managed to flee to the Soviet Union. Honecker then managed to stay there until the leader of the Soviet Union was removed, then fled to the Chilean embassy, where both the Chilean president and ambassador gave Honecker and his wife asylum.⁷⁰ Eventually through pressure from Germany, Chile gave into the demands of the newly unified

⁶⁹ Fulbrook, 173.

⁷⁰ Lea Albrecht, "Ex-East Germany Leader Erich Honecker's arrest: 25 years on" *Deutsche Welle*, July 7, 2017.

This time spent in the Chilean embassy was seen as cashing in a favor for Honecker, because he had allowed the Chilean ambassador to the Soviet Union, Clodomiro Almeyda, to reside in East Germany during the Chilean revolutions.

nation. The German people wanted to bring the man accountable of the deaths of hundreds of people to justice for his responsibility in all of it.⁷¹

A news article from the *New York Times* from July 30th, 1992, covers the then 79-year-old Honecker's arrival in Germany, which was attended by "Several hundred people gathered to witness Mr. Honecker's airport arrival,". Honecker's reception into Germany was one of distaste, as the hundred gathered had signs with slogans "Honecker mass Murderer – Death Penalty!" There was confusing reports from German government officials leading up to Honecker's arrival about if whether or not the former leader of the German Democratic Republic would be brought back to face trial. Honecker however was defiant, and had given the Communist salute to the those that watched him leave the Chilean embassy. The charges being brought up against Honecker were the installation of explosive devices into the "death-strip" that separated East and West Berlin, and other parts of Germany as well, which the article states left 49 people dead as they attempted to get to West Germany. That is not where the potential charges end though, as at the time of the article, it is estimated that some 350 people were killed at the inner German border during its 28 year implementation. He will be held accountable to them if the theory of the "shoot to kill" order was confirmed. What was not working in Honecker's favor in his trial is the several groups of former border guards that have been tried, all of which had stated that they were operating under orders to kill those that were fleeing. To top off everything, Honecker was also charged with embezzling some nine-million dollars from the East German state.⁷² The article then describes Honecker's escape from Germany to the Soviet Union, and how when the then leader of the U.S.S.R. Mikhail Gorbachev was deposed

⁷¹ Albrecht, "Ex-East German Leader".

⁷² Stephen Kinzer, "Honecker Flown to Berlin to Face Criminal Trial" *New York Times*, July 30, 1992, sec. A6, p. 6.

from power he then went to the Chilean embassy. In the Chilean embassy Honecker was an “embarrassment” to the Chilean officials, and due to the removal of the Chilean ambassador, Almeyda, who had allowed him to stay there, and pressure on Chile from the now unified Germany, was then forced to leave.⁷³

Kinzer’s article answers why Honecker was not immediately brought to court in light of the border guard trials, and seems to point to the fact that he knew his own guilt as well. It would take the Unified German Government almost 2 years to secure Honecker to face trial. It becomes very apparent that the West German public had a distinct disdain for the former leader of the German Democratic Republic. With the public demonstrators at Honecker’s arrival in the country, wanting the death penalty, it was clear that they held him responsible for the deaths for hundreds of people attempting to move from East Germany to West. Honecker’s need to hide seems to hold some form of guilt in itself, having to go through the troubles of making his way with his family to Russia, and then to hide out in the Chilean embassy, were not the actions of an innocent man. Also, the article points to the border guard trials as an important part in the possible conviction of Honecker. According to the article the idea that Honecker gave an order to shoot has been backed up by every group of border guards that have been tried, not leaving a promising future for Honecker’s defense in trial. Later in the article, Honecker’s defense team says that the trial was merely a political move, which would imply that the trial was all for show on the international stage, however, the German courts denounce this idea, saying that they wanted to do “...what is right and just.”⁷⁴ Honecker and his defense team seem to be taking every action they could to discredit his trial, again, not the actions of an innocent man. Honecker

⁷³ Kinzer, “Honecker Flown to Berlin”.

⁷⁴ Kinzer, “Honecker Flown to Berlin”.

still faced trial, and from that his defense statement gives light into his reasoning for the policies that he promoted, and how he views the new state of Germany.

Two years after Germany has been unified, and the trials for the former East German border guards continue, the man at the top of the chain of command for the now defunct German Democratic Republic was brought to trial. Erich Honecker was flown from the Soviet Union, to Berlin where the trials took place. After being held in Berlin for 4 months, Honecker was finally put on trial for the crimes that unified Germany's State Justice department was bringing against him on November 12th, 1992. The trial was being moved along quickly, in what Honecker's defense team called "a race with death" as Honecker was said to be dying from liver cancer. Honecker was being tried along with four other former leaders from the German Democratic Republic, the former Prime Minister Willi Stoph, Defense Minister Heinz Kessler, deputy Defense Minister Fritz Strelitz, and former communist party secretary Hans Albrecht.⁷⁵ From the trial there is a transcript of Honecker's legal defense from December 7th, 1992, discussing the trial and defending his policies in the former East German state.

Honecker starts his defense by denying that the trial has any sort of justice behind it. Calling the accusation of manslaughter that he faces "baseless" he also says he had seen no reason to prepare a proper defense due to his failing health, for which he believed that he would not make it through the trial. Honecker viewed his trial merely as a "farce" and "political theater" as the reasons he was truly being tried. Honecker goes on to describe what could be compared to a witch hunt for communists, especially those tied in with the former government of the GDR. Claiming that politicians and lawyers were stating "We have to convict the

⁷⁵ "Honecker Trial Starts Nov. 12th" *New York Times* (New York, New York) October 12, 1992, sec. A3, p. 3.

communists, since we did not convict the Nazis. This time we have to come to terms with our past.” He blamed the fact of not trying all of the Nazis on that many of the West German justices would have had to convict themselves, which they were not willing to do. Honecker expanded on the unwillingness to then promote that the current legal policies are those promoted by these former Nazi members. Honecker claimed that he was not responsible for the death of any person directly, or for giving orders that people should die. He stated that he was being accused of making sure that policies of the Berlin wall, its upkeep and enforcing the prohibition of leaving the country, in the same way as if he had murdered someone. Honecker saw his statements as a means of detailing the ridiculousness of the trial, and that in time it will not stand to further scrutiny. The rest of his claim goes over the life of commitment he gave to communism and the German Democratic Republic. He acknowledges that mistakes were made within the system, but feels that it was a good showing of how socialism was better than the capitalist system. Honecker blames a part of the failure on the citizens of the GDR, for making the wrong choices. He finishes by giving the almost foreboding statement that the citizens of the former East Germany will find that the freedoms that they did have under the communist system, will be far greater than what they will find with the western government.⁷⁶

The justice that Honecker was talking about seems like a stretch from the man who allowed the long term internment of political prisoners in solitary confinement for views that differed from the communist regime. To also say that he gave no direct orders was a bit of a fallacy as well, given that at the time of Honecker’s trial there was already documentation that proved otherwise. The documentation mentioned was a transcript from the “East German

⁷⁶ “Honecker’s Legal Defense” in *Uniting Germany: Documents and Debates, 1944-1993*, edited by Konrad Jarausch, 261. Oxford: Berghahn Books, pgs. 161-163
Not full text, but snippets from the collector of this book

National Defense Council meeting on May 6, 1974".⁷⁷ Within the Defense Council meeting, the prosecutors had found in the meeting record "the ruthless use of firearms must continue to be applied in response to attempts at illegally crossing the border".⁷⁸ There was some solidarity in Honecker's argument however that any sort of documentation that bears his signature specifically ordering the use of lethal force cannot be found. However, the universal statement of the guards that were tried was that they were given orders, pointed to an order existing. It could be that the guards were following what may have gotten many former Nazis that were tried in the Nuremburg trials off from sentencing however. One line specifically in Honecker's defense of interest however was that of his statement of "We – as I already said – obviously did not personally kill anyone, nor directly order the killing of any individuals."⁷⁹ This does not give the sense of ordering to kill specific people, on a name by name basis, but it does not negate the statements from the transcript of the meeting where they discussed the use of firearms in dealing with those attempting to flee. Honecker though did not act alone, and was certainly not on trial by himself.

During the East German border guard trials, there were five other former officials on trial in Berlin with Erich Honecker on November 12th, 1992. These officials were the former prime minister Willi Stoph, security chief Erich Mielke, defense minister Heinz Kessler, Kessler's deputy Fritz Streletz, and Communist party boss Hans Albrecht. The trial was clearly an exciting issue according to Steve Vogel a journalist with the *Washington Post* present at the trial, stating that people were lined up as early as 2 a.m. for a 9 a.m. trial, trying to get the limited

⁷⁷ Steve Vogel "East German Leaders Go on Trial in Berlin" *Washington Post* November 13, 1992.

⁷⁸ Vogel, "East German Leaders Go on Trial".

⁷⁹ Honecker's legal defense, 262.

The "We" here refers to himself and the other former East German Leaders on trial with him.

seating available.⁸⁰ The trial did not go smoothly however, leaving many wanting, and only what was deemed “...very small compensation”⁸¹

The trial of these leaders hit early complications due to the age of the defendants. 78-year-old Willi Stoph had suffered a heart attack a short time before the trial was supposed to take place. The heart attack caused Stoph to be absent from the first session of the trial because of it, which caused the trial to be delayed until Monday, the 14th, two days later.⁸² Stoph was not the only one with health issues; according to a court medical advisor the 80-year-old Honecker only had around 18 months to live as he was suffering from a case of liver cancer⁸³ also caused the trial to be limited to only 3 hour meetings twice a week.⁸⁴ The court seemed to be racing to get a verdict before Honecker’s time on earth ran out. Mielke, at 84, in an interview in January of 1992, had described himself as ‘. . .“fatally ill” and suffering from depression.’⁸⁵ Hans Albrecht, at age 73, was excused from attending the trials on account of health reasons. Only Kessler, age 73, and Streletz, age 66, were healthy enough to stand trial.⁸⁶ The *New York Times* quoted a poll that was taken during the months prior to the trial, that despite the health issues, some fifty-nine percent of West Germans, and fifty-one percent of East Germans believed it was right to try Honecker and the rest of the leadership.⁸⁷ Regardless of the health problems, and

⁸⁰ Steve Vogel, “East German Leaders Go on Trial in Berlin”

⁸¹ Stephen Kinzer, “3 Ex-East German Leader’s Convicted” *New York Times*, September 17, 1993, sec. A3, p. 3.

⁸² “Trial of Honecker’s Ailing Ex-Aide is Suspended,” *Los Angeles Times*, November 14, 1992,

⁸³ “Honecker Trial Starts” *New York Times*, October 21, 1992, sec. A3, p. 3

⁸⁴ Francine Kiefer, “Honecker Trial Starts With Sputter” *Christian Science Monitor*, November 13, 1992.

⁸⁵ Kinzer, “2 East German Guards convicted”.

⁸⁶ Kinzer, “3 Ex-East German Leaders convicted”.

⁸⁷ Stephen Kinzer, “Senior East Germans Go on Trial; Critics Ask if Such a Case is Just,” *New York Times*, November 13, 1992, sec. A8, p. 8.

critics pushing for an end to the trials due to the inhumane treatment of the sick and elderly, a verdict was reached.

In mid-September, 1993, after 9 months of hearings for the trial, verdicts were given on the six former leaders of the GDR. Heinz Kessler received a sentence of seven and a half years in prison. His deputy, Fritz Streletz received a five year prison sentence for the deaths of seven people at the Berlin Wall. Hans Albrecht was sentenced to four and a half years in prison for the deaths of six people however, he was excused sentence due to his failing health. The judge of the trial, Hans Boss, found for Kessler and Streletz guilty due to their positions that “directed border troops in their work, and thereby assumed responsibility for the death of refugees.” The accusations were brought forward by the German legal system and four relatives of East Germans killed at the Berlin wall, including the mother of Chris Gueffroy, the last person to be killed before the Berlin Wall was opened. However, what many were disappointed by was the lack of sentencing for Erich Honecker, Erich Mielke, and Willi Stoph. Honecker had persuaded the “. . . judges that he was too ill to stand trial.” Honecker was then allowed to join his family, who had taken refuge in Chile. Mielke and Stoph would be excused from charges.⁸⁸

The issue of state sovereignty, and the ability of the international community to give judgement on events within that happened within a state, was included in the delineation over the trial of the former GDR leaders. The German public was over all in favor of the trials of the former leaders of East Germany, be it only marginally the majority opinion, finding more favor in West Germany than in the East. Another question raised within these trials however was that of state sovereignty, and the rights of a sovereign state to hold and enact its own laws. What the German courts were going for with these trials was a way to say that there is punishment for

⁸⁸ Kinzer, “3 Ex-East German Leaders Convicted”.

crimes committed by governments. That a state cannot be responsible for the deaths of hundreds of individuals that attempt to leave and not be held accountable.⁸⁹ This question is only briefly mentioned, but according to Stephen Kinzer's article covering the trial was a topic of much discussion amongst political leaders and legal scholars alike.⁹⁰ But these questions, like in the border guard trials, seemed to have had no impact in changing the outcomes of the trials.

What had ultimately ended the trials of these six former leaders from East Germany was that of human dignity. The aging, and sick defendants were not up for the strains of the trial, and so these leaders, as was the case of Honecker, Mielke, and Stoph, were excused from both indictment and trial, while Kessler, Streletz, and Albrecht served sentences that were half of what the prosecutors had asked for.⁹¹ As Schneider in his article had pointed out before, some form of justice was needed.⁹² Justice ultimately did not come in the form of case verdicts for the leaders, but at least a recognition that what had happened was worthy of address, as a future example for the world to come, and that a state may be held accountable to its actions.

In terms of the East and West German reunification, there were a lot of legal questions to be answered due to the combining of two very different societies, and in particular the deaths of those who had tried to flee from East Germany to West Germany. In the Reunification Treaty that detailed the combining of the German Democratic Republic, and the Federal Republic of Germany, there was no structure given for how to bring the past crimes of East Germany to justice, only a goal of moving forward in unity. The courts of reunified Germany reviewed 62,000 cases, including the returning of state appropriated property, mishandling of state funds,

⁸⁹ Kinzer, "Senior East German's Go on Trial"

⁹⁰ Kinzer, "Senior East German's Go on Trial".

⁹¹ Kinzer, "3 Ex-East German Leaders".

⁹² Schneider, "Facing Germany's Newer Past".

corruption, and the East German border guards, without a framework to follow, leaving room for error and misguided decisions. Willy Brandt was correct in his speech which was hopeful, but also cautionary, that what lay ahead was something new, and unique which needed to be worked through slowly.

The East German border guard trials began in 1991, and raised the issue of can the East German border guards be retroactively charged for actions that they committed in different state? Much of the German populace and law professors from the United States promoted that the trials were not legally, or morally justifiable in nature. Many, on account of the guards, felt that the trials were not legal, and that the border guards could not be convicted for actions that were legal in the state that the actions took place in. To this day, no legal basis has been found that stated that the actions of the East German border guards were illegal in East Germany. Therefore the trials were not correct in attempting to convict the border guards for the deaths of those that attempted to immigrate from East Germany to West Germany.

Throughout the East German border guard trials the call for prosecution against the former leaders of the German Democratic Republic was clearly heard. The German people felt that the former leaders of the German Democratic Republic were to blame for the atrocities and murders that occurred on the border throughout Germany. Two years later, when Honecker and his associates were finally tried, there was a sense of disappointment throughout Germany, as these main leaders were either released or given short prison sentences on account of health issues, and old age.

On August 12th, 2007, almost fourteen years after the end of the trials of the East German leaders, the shoot-to-kill order was found in the Stasi archives by German archivists in the east German city of Magdeburg. This order explicitly called for the use of firearms in stopping

defectors from escaping East Germany. The discovery of the missing document proved that the East German border guard trials were unjust, for if this missing document would have come to light during the trials, then the former leaders, who had staved off conviction, would have been convicted, and the border guards would have been found, not guilty.⁹³

Even if the shoot-to-kill order was still undiscovered, the East German border guards were unjustly prosecuted for their actions during the split between East and West Germany. The trials of the East German border guards were breaking the reunification treaty. In chapter II, article 3 of the Reunification treaty, it says that the Basic Law, of the FRG will go into effect upon the reunification.⁹⁴ Within the Basic Law, in chapter IX, article 103, the Basic Law states that “An act may be punished only if it was defined by a law as a criminal offence before the act was committed.”⁹⁵ The reunified German state should not have retroactively charged the border guards for the deaths of those attempting to flee East Germany; especially since these actions were not illegal under the East German government.

The reunification of East and West Germany, and the problems that came with it in the East German border guard trials, are not an enigma. Germany is not the only country to have been divided, and is potentially not the only country to reunite. In light of this, there are lessons to be learned from the German reunification for those divided countries that may undergo the same process in the years to come. To be careful to not cause more injustices by attempting to reconcile the past, to understand the importance of not only the legal perspective, but also that of

⁹³ Judy Dempsey, “East German Shoot-to-Kill Order is Found” *New York Times*, August 13, 2007.

⁹⁴ “The Unification Treaty” in *German History in Documents and Images* 10, One Germany in Europe, 1989-2009, 2.

⁹⁵ *Basic Law for the Federal Republic of Germany*, German Bundestag, May 23, 1949, 89

the general people. It is up to these future countries to decide for themselves how they will reconcile their past, and make steps towards their future as a unified state.

Reunification was a messy process, full of hard decisions. The newly reunified German state was leading the way in combining two different states that had been apart, without any prior examples to go off of. The combining of two societies that operated in two different ways for almost fifty years needed to be a drawn out process, taking time to lay out all of the differences between a communist and capitalist system, and reconciling them.

The legal perspective on the East and West German reunification is lacking, and the purpose of the paper is to add another voice, and a more recent perspective on the legal issues of retroactivity and state sovereignty when two states reunite. Within the research, the only other historical content about the legal issues of German reunification was that of James McAdams book written in 2001. Though a good account of the legal issues faced within the East and West German reunification, new discoveries, such as that of the shoot-to-kill order in 2007, and the last verdict of a border guard trial in 2005, shed new light on the legal problems reunification.

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