



**THE HONECKER TRIAL:  
THE EAST GERMAN PAST AND THE GERMAN FUTURE**

**Working paper #216 - January 1996**

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The author has greatly benefited from the generous assistance of numerous individuals in writing this essay: Alex Hahn, Donald Kommers, Hans-Heinrich Mahnke, Walter Nicgorski, Patti Ogden, Peter Quint, John Roos, Brad Roth, Gunnar Schuster, John Yoder, and José Zalaquett, as well as the participants in the 1995 Notre Dame symposium on "Political Justice and the Transition to Democracy" and three anonymous referees. He is grateful to the Institute for Scholarship in the Liberal Arts and the Helen Kellogg Institute for International Studies, both at Notre Dame, for supporting the larger project of which this paper is a part.

The paper is also published in the *Review of Politics* 58(1).

## ABSTRACT

Fifty years after the Nuremberg tribunals, Germany is once again caught up in a series of controversial trials involving former dictators. This time officials of the former German Democratic Republic (GDR) sit in the dock. Some observers have criticized these proceedings, maintaining that they will result in the imposition of an arbitrary form of 'victor's justice.' Others have claimed, in contrast, that the cumbersome German *Rechtsstaat* ('state under the law') will prove incapable of responding to public demands for retribution. In this paper the author maintains that Germany's courts have not been at a loss to answer these complaints. By grounding their judgments in preexisting East German law, the courts have managed to bring some of the GDR's former leaders to justice while at the same time guaranteeing most defendants the full protections of the rule of law. In the process the courts have even conveyed an important message about the terms under which both German populations will be brought back together again.

## RESUMEN

Cincuenta años después de los tribunales de Nuremberg, Alemania se encuentra, una vez más, atrapada en una serie de juicios controvertidos que involucran a ex-dictadores. Esta vez, las autoridades de la ex-República Democrática Alemana (GDR), se encuentran en el banquillo de los acusados. Algunos observadores han criticado estos procedimientos, arguyendo que traerán como resultado la imposición de una forma arbitraria de 'justicia del vencedor.' Otros, en contraste, sostienen que el *Rechtsstaat* alemán ('estado bajo la ley'), difícil de manejar, será incapaz de responder a las demandas públicas de retribución. En este artículo, el autor sostiene que las cortes alemanas no han sido inefectivas al responder a estas quejas. Al asentar sus juicios en la ley preexistente de Alemania del Este, las cortes han logrado enjuiciar a algunos de los ex-líderes de la República Democrática Alemana, garantizando, al mismo tiempo, a la mayoría de los acusados, la protección completa del estado de derecho. Incluso, a lo largo del proceso, las cortes han transmitido un mensaje importante acerca de los términos bajo los cuales ambas poblaciones alemanas quedarán unidas nuevamente.

On this, the fiftieth anniversary of the Nuremberg trials, Germans are once again wrestling with the historical legacies of dictatorship. Since the fall of the German Democratic Republic (GDR) in 1989, a special parliamentary commission has been formed to investigate the crimes and abuses of four decades of communist rule. Political parties regularly do battle over who is to be credited with the reunification of Germany and who is to be blamed for hindering it. Church leaders agonize over the mixed record of years of making secret deals with the communist regime, and former dissidents despair over the absence of a thoroughgoing 'reckoning' with the East German past. In all of these disputes, there is much disagreement about what exactly happened during 40 years of national division. But everyone agrees that the decisions that are made today about how one should interpret the past will play a significant role in shaping the future self-image of the Federal Republic of Germany (FRG).

Amidst this turmoil, Germany's courts too have assumed an unexpected degree of prominence in the early 1990s. Certainly, German judges and lawyers did not intend to get mixed up in the controversies over what did and did not happen during the communist era.<sup>i</sup> Nor did they plan to take sides in the swirling debates over how best to bring their eastern and western German countrymen together again. Nonetheless, thanks to their involvement in the trials of both former communist leaders and lesser-known representatives of the East German regime (e.g., the borderguards at the Berlin Wall), the courts have been thrown fully into the fray.

On the one hand, they have come under attack from the opponents of the trials, who have accused them of revisiting the judicial arbitrariness of the Nuremberg trials and pandering to a form of 'victor's justice' that has impaired the unification process. On the other hand, a quite different group of critics has accused the courts of paying excessive attention to legal niceties while seemingly remaining blind to the need to punish Germany's former dictators. "We expected justice," eastern German dissident Bärbel Bohley intoned in a famous complaint about the rigidity of the German legal system, "but we got the *Rechtsstaat* instead."<sup>ii</sup>

Neither of these attacks should have been surprising. Preunification West German criminal law was not designed to deal with the sorts of government-sponsored crimes of the GDR era. Hence, its application to offenses committed under communist rule was bound to displease both accusers and accused. By the same token, however, the courts have not been at a loss to respond to these charges. As we shall see in this essay on the most-publicized of the post-unification trials—that of East German leader Erich Honecker and five other defendants in

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<sup>i</sup> Whatever their intentions, courts have quite frequently found themselves playing the role of lay historians. For a similar role in a different context, cf. David A. J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989), chaps. 1–2.

<sup>ii</sup> Cited in Andreas Zielcke, "Der Kälteschock des Rechtsstaates," *Frankfurter Allgemeine Zeitung*, 9 November 1991.

1992–93—the courts have found a way of justifying their actions that is both consistent with the rule of law in the FRG and attentive to public demands for retribution.

Notably, German judges have chosen to base their rulings on legal standards different from those once used to convict the leaders of the National Socialist regime. But we shall also suggest that the proceedings against Honecker and other East German officials have carried with them some important lessons about the benefits of life in a *Rechtsstaat* (state under the law). In this respect, whatever their shortcomings and limitations, the trials may also have provided some hopeful lessons about the terms under which the two German populations are to be brought together again.

### Judging the East German Past

There is a well-known lament about the East German revolution of 1989. If only those who staged the revolution had been able to put their leaders on trial themselves, they would have saved themselves much heartache and the German judicial system a great deal of trouble.<sup>iii</sup> The eastern German population could have decided for itself what, if anything, to do with the likes of Erich Honecker and the Germans to the west of the Elbe could have been spared the problems of contending with the affairs of a state that had only recently ceased to exist. Of course, this lament ignores one of the more profound blessings of the events of 1989–90. Above all, it was the speed of the GDR's collapse that made national reunification as peaceful as it was. Yet, the observation does call our attention to a telling fact about all of the efforts to assess responsibility for the crimes of the communist era. There could be no trials until the FRG's courts had first addressed their competence to pass judgment on East Germany's leaders.

In the initial euphoria attending the GDR's fall, this did not seem to be a major problem to the majority of Germans, East or West. In both parts of the formerly divided nation, one encountered a widespread conviction that Germany was once again being called to confront and overcome—in common parlance, *aufarbeiten*—the legacy of totalitarianism. According to this view, Honecker and his associates were not merely guilty of having committed specific criminal offenses during their time in office. As the leaders of the GDR's Socialist Unity Party (SED), they were responsible for setting into motion and then maintaining what many Germans felt was a distinctively unjust political order, an *Unrechtsstaat* (state without law). This was a state in which—to quote Karl Jasper's well-known judgment about the Nazi regime—the entire legal

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<sup>iii</sup> See Christoph Dieckmann's lament that the case against Honecker was not 'our' trial, in *Die Zeit*, 29 January 1993, p. 3. Also Joachim Jahn, "Warum ist die Verfolgung der DDR Regierungskriminalität so schwer?" *Das Parlament*, 10 April 1992, p. 17.

system had been nothing more than “a means for pacifying the masses of its people and forcing them into submission.”<sup>iv</sup>

Admittedly, those who sought to prosecute the East German elite on these grounds did not always agree about how far one could go in likening the Honecker regime to the system of injustice propagated by Hitler. For some observers, such as Rudolf Wassermann, a former Higher Regional Court president and an outspoken proponent of a judicial reckoning with the GDR past, the similarities between the two systems were ‘disturbing.’ “The campaign of destruction against ‘Marxists’ and ‘alien peoples,’” Wassermann has written,

had its parallels in the communist struggle against the bourgeoisie as a ‘class enemy.’ The one group disregarded human rights from the standpoint of race while the other did it from the class standpoint. The oppression in [East Germany] was even more tangible than under national socialism, because communist rule had no legitimacy at all and people had to be forced to go along, while almost to its end, the national socialist system was based upon the broad consent of much of its population.<sup>v</sup>

Other critics of the East German regime were less inclined to equate the SED’s rule with that of the NSDAP. They noted the different origins of the two dictatorships and the greater extent of the crimes committed under the Nazis.<sup>vi</sup>

Nevertheless, all these critics could agree on one point that was central to the characterization of the GDR as an *Unrechtsstaat*. Precisely because of the distorted nature of the East German legal system, no one—from Honecker down to the lowliest borderguards—should be able to excuse or justify manifestly criminal behavior by claiming that they were operating within the law of their land. To allow them to hide their crimes behind the elaborate web of legal fictions that had been created to give the GDR its veneer of legitimacy would make a mockery of the idea

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<sup>iv</sup> Although contemporary references to the *Unrechtsstaat* frequently draw upon Jaspers’s work, Jaspers himself used the somewhat more easily translatable term *Verbrecherstaat* (criminal state). See *Wohin treibt die Bundesrepublik?* (Munich: Piper reprint, 1988), p. 21.

<sup>v</sup> “Zur Aufarbeitung des SED Unrechts,” *Aus Politik und Zeitgeschichte*, n. 4 (22 January 1993), p. 3. For a similar perspective, see Christa Hoffmann, *Stunden Null? Vergangenheitsbewältigung in Deutschland 1945 und 1989* (Bonn: Bouvier, 1992), pp. 287–302.

<sup>vi</sup> See the subtle assessment of the GDR as “im Kern ein Unrechtsstaat” (at the core a state without law) by Horst Sendler, a former president of the Federal Verwaltungsgericht, “Über Rechtsstaat, Unrechtsstaat und anderes—Das Editorial der Herausgeber im Meinungsstreit,” *Neue Justiz*, n. 9 (1991), pp. 379–81. Cf. Hans Peter Krüger, “Eine Krake im Kampf mit sich selbst,” *Frankfurter Allgemeine Zeitung*, 13 June 1991; Lothar Probst, “German Past, Germany’s Future: Intellectual Controversies since Reunification,” *German Politics and Society*, n. 30 (Fall 1993), pp. 29–30; and Claus Leggewie and Horst Meier, “Zum Auftakt ein Schlusstrich?” in Cora Stephan, ed., *Wir Kollaborateure* (Reinbek bei Hamburg: Rowohlt, 1992), p. 55, although the two last mentioned authors do not strictly view the GDR as an *Unrechtsstaat*.

of law as it was understood in the West. It would be tantamount, as legal theorist Eckhard Jesse has underscored, to condoning the abuses of the old East German order.<sup>vii</sup>

In fact, within the body of German jurisprudence, there seemed to be an excellent precedent for dealing with the protests of innocence that could be expected from the GDR's representatives at their trials. In cases when former Nazi officials had sought to excuse their crimes by claiming fidelity to the law of the Third Reich, West German courts frequently appealed to a natural law standard set by one of the Federal Republic's preeminent legal philosophers, Gustav Radbruch. In a formulation still associated with his name, Radbruch argued that the courts could not be bound solely by the strictures of the positive law in reaching their judgments. In circumstances where a conflict existed between the codified law and a higher conception of justice and the contradiction between the two assumed, in Radbruch's carefully chosen words, an "intolerable dimension," it was not only suitable but imperative that the law be declared "unjust [*unrichtiges Recht*]" and subordinated to the cause of morality.<sup>viii</sup>

Nonetheless, there were two problems with using such suprapositive standards to justify the SED trials. The first problem was political. In the heated context of national unification, the FRG's leaders, Chancellor Helmut Kohl and Minister of Justice Klaus Kinkel, were intent upon avoiding the impression that the legal mores of the Federal Republic were being imposed upon the defeated leadership of the GDR. By itself, this was no easy task. Up to 1989 the West German government had maintained a relatively cordial, if not always amicable, relationship with the SED regime; Honecker himself had been welcomed with some fanfare for an official state visit to the FRG only two years before the opening of the Wall. Thus, Kohl and Kinkel were understandably at pains to stress that they were 'strictly against' any politicization of the proceedings against the East German head of state. "We do not hold political trials," the chancellor announced.<sup>ix</sup>

However, Germany's leaders were also concerned about an even more delicate issue. This was the impact that the appeal to a higher—but still relatively amorphous—conception of justice might have upon the FRG's self-understanding as a *Rechtsstaat*. As citizens of the newly unified German state, Honecker and everyone else who had been associated with the GDR

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vii "‘Entnazifizierung’ und ‘Entstasifizierung’ als politisches Problem" in Josef Isensee, ed., *Vergangenheitsbewältigung durch Recht* (Berlin: Duncker und Humblot, 1992), p. 35. For similar views, see Karl Dietrich Bracher, "Die Unterdrücker zur Rechenschaft ziehen," *Universitas*, v. 11 (1991), pp. 1025–28; and Christa Hoffmann, *Stunden Null?* pp. 247, 276.

viii Radbruch's words are cited in Uwe Wesel, *Ein Staat vor Gericht: Der Honecker Prozess* (Frankfurt am Main: Eichborn, 1994), p. 38.

ix See "Interview with Helmut Kohl," *Statements and Speeches*, v. 15, n. 12, 13 August 1992, p. 2. See also Karl Wilhelm Fricke, "Honecker unter Anklage," *Deutschland Archiv*, n. 10 (October 1992), pp. 1009–10.

government were entitled to all of the protections of the Basic Law.<sup>x</sup> They enjoyed the presumption of innocence. They could be punished only in proportion to the severity of their crimes. And most important in this context, they had the right to have known *in advance* whether their actions constituted criminal offenses. As the Basic Law itself specified, in a formulation commonly known by its Latin equivalent, *nulla poena sine lege*, “an act [could] be punished only if it was an offense against the law before the act was committed” (Art. 103, § 2).<sup>xi</sup> The architects of German unity were so attentive to this prohibition on ex post facto lawmaking that they deliberately incorporated the principle into the Unification Treaty of 1990. The accord expressly stipulated that crimes committed before the date of national unification could be adjudicated only according to the East German penal code.<sup>xii</sup>

This was no mean guarantee. On the one hand, it protected German policymakers from Honecker’s and others’ claims that the FRG was behaving in the same capricious and arbitrary fashion of which it was accusing the GDR. Adherence to *nulla poena sine lege* meant that Germany’s courts would act squarely within the letter of the Basic Law.<sup>xiii</sup> But, on the other hand, this protection had the rather paradoxical consequence of shaping the way one viewed the GDR as an historical entity. Unavoidably, once the decision had been made to hold East German officials accountable for specific violations of their country’s laws, one had to begin thinking of the GDR as something much more complex than the undifferentiated *Unrechtsstaat*.

Klaus Kinkel admitted as much in a major address in February 1992, when he warned against giving any of the individuals on trial the opportunity to treat their crimes as “the independent activities of systems, apparatuses, and organized collectivities [*Grossgruppen*].”

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<sup>x</sup> To quote Kohl again: “We can’t have it both ways. We can’t have a bloody revolution and at the same time celebrate a peaceful revolution. If we have a system of government based on the rule of law, then the law applies to every citizen of this country, even if the citizen happens to be Erich Honecker.” In “Interview,” op cit., p. 2.

<sup>xi</sup> See Donald Kommers, “Basic Rights and Constitutional Review” in C. Schweizer, D. Karsten, R. Spencer, R. Cole, D. Kommers, and A. Nicholls, eds., *Politics and Government in the Federal Republic of Germany, Basic Documents* (Coventry: Berg, 1984), p. 84.

<sup>xii</sup> See *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands* (Bonn: Presse- und Informationsamt, 1990), p. 925, Article 315. There were exceptions to this general rule. For example, the FRG reserved the right to apply West German law to offenses committed in the GDR when its own penal code was more lenient than the East German code. On the Unification Treaty, see Peter Quint, “The Constitutional Law of German Unification,” *Maryland Law Review*, v. 50, n. 3 (1991), pp. 475–631; and Paul Schwartz, “Constitutional Change and Constitutional Legitimation: The Example of German Unification,” *Houston Law Review*, v. 31, n. 4 (Winter 1994), pp. 1027–1104.

<sup>xiii</sup> This is not to say that German courts were *necessarily* bound to exclude suprapositive norms of justice from their decisions but only that, in this particular case, both jurists and politicians reasoned that it was most appropriate to emphasize the positive law. On the tension between these norms within the Basic Law, see Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989), p. 43.

“Even in a dictatorship,” Kinkel emphasized, “the individual’s room for maneuver is just not as small as the perpetrators would like us to believe.”<sup>xiv</sup> Apparently, the justice minister was fully aware of the implications of this statement. If there was room for individual choice in the old GDR, there must also have been standards of behavior, legal and otherwise, that the country’s leaders simply decided to ignore. Again Kinkel: “Even the criminal code of the GDR treated manslaughter (*Totschlag*), bodily harm, [false] imprisonment, and violations of the peace as punishable offenses. In numerous ways, the GDR’s rulers disregarded and infringed upon their laws, and thus they can be prosecuted today according to the criminal code of the GDR.”<sup>xv</sup>

By late 1992, when the FRG’s courts finally turned to the cases against Honecker and his coleaders, the majority of German judges seem to have come around to Kinkel’s differentiated understanding of the legal culture of the GDR. However, this way of thinking about the former communist state was by no means automatic. Even before Honecker was brought to trial, Kinkel and his supporters still needed to overcome the reservations of many judicial authorities who felt that the GDR could only be judged according to a special standard of justice. This tension was nowhere more apparent than in the first of several trials of former East German borderguards that began in 1991.

### Seeking Justice within the Law

In retrospect, it seems logical that Honecker’s trial would be preceded by the trials of those individuals who could be directly tied to the killings at the Berlin Wall and along the inter-German border.<sup>xvi</sup> If one could not hold them responsible for their crimes, it was likely to be even harder to prosecute the individuals above them. Yet, as the first of the borderguard trials showed, some judges refused to believe that GDR law should play any role at all in resolving this

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<sup>xiv</sup> Klaus Kinkel, “Wiedervereinigung und Strafrecht,” *Juristen Zeitung*, v. 47, n. 10 (22 May 1992), p. 487.

<sup>xv</sup> *Ibid.*, p. 487. I am aware that many German legal terms, such as *Totschlag*, cannot be perfectly rendered in English translation. However, in deciding upon translations, I have tried to use conventional terms that should suffice for the general purposes of this essay.

<sup>xvi</sup> On the sequencing of the trials, see Wesel, *Ein Staat vor Gericht*, p. 33. On the borderguard trials, Joachim Hruschke, “Die Todesschüsse an der Berliner Mauer vor Gericht,” *Juristen Zeitung*, n. 13 (1992), pp. 665–70; Jörg Polakiewicz, “Verfassungs- und völkerrechtliche Aspekte der strafrechtlichen Ahndung des Schu waffeneinsatzes an der innerdeutschen Grenze,” *Europäische Grundrechte Zeitschrift*, v. 19, n. 9–10 (5 June 1992), pp. 177–90; Antje Petersen, “The First Berlin Border Guard Trial,” Occasional Paper No. 15 (Bloomington, IN: Indiana Center on Global Change and World Peace, December 1992), pp. 1–39; Kif Augustine Adams, “What is Just? The Rule of Law and Natural Law in the Trials of Former East German Border Guards,” *Stanford Journal of International Law*, n. 29 (1993), pp. 271–314; and Herwig Roggemann, “Zur Strafbarkeit der Mauerschützen,” *Deutsch-deutsche Rechts-Zeitschrift*, n. 1 (1993), pp. 10–19.



uncertainty. Only later, after the courts had revisited the issue, did a general understanding begin to emerge about the criteria to be used in adjudicating these cases.

The first borderguard trial began on 2 September 1991 and eventually led to the conviction of two soldiers for killing 20-year-old Chris Gueffroy (the so-called last victim of the Wall) on 5 February 1989. But from the first day of the proceedings the trial was marked by controversy. The credibility of the presiding judge, Theodor Seidel, was impaired because he had once belonged to an organization that smuggled refugees out of East Germany and he did not try to hide his political biases at the trial. Moreover, Seidel was never able to insulate his court from the frenzied attention of the media. For our purposes, however, the most problematic aspect of the trial lay in the way Seidel went about finding the defendants guilty of their crimes.

In their defense, as one might have predicted, the former guards appealed to the argument already made famous at Nuremberg. They admitted to using their weapons against persons who had sought to flee the GDR, but they contended that they were simply carrying out their duty as soldiers and acting well within the law of their country. These claims were not totally without foundation. According to the East German penal code (§213), it was a criminal offense to seek to leave the GDR without official permission. Furthermore, the border troops seem to have enjoyed some latitude in enforcing this statute. The Revised Border Law of 1982 expressly stated that “the use of physical force [was] allowable when other means were not sufficient to prevent serious consequences for the security and order of the border territory” (Section 26.1). Also, the law permitted the use of firearms “to prevent the imminent commission of a crime” (Section 27.2).<sup>xvii</sup>

Given these provisions, one might have expected Seidel to base his judgment against the defendants upon their erroneous interpretation of the law or, at least, upon the fact that the appeal to superior orders had ultimately failed to win the judges’ sympathy at Nuremberg. Yet, interestingly, the judge acted as if the existence or nonexistence of previous statutes or precedents was irrelevant to the case. The real issue was what kind of state the GDR had been. Explicitly citing the Radbruch principle, Seidel emphasized that one could not respect the laws of a regime whose leaders enjoyed “no form of legitimation [*durch nichts legitimiert waren*].” In his view, the legal standards of the GDR stood—again he used Radbruch’s terminology—in “crass contradiction to the generally recognized foundations of the rule of law.”<sup>xviii</sup> Therefore, the

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<sup>xvii</sup> Cited in Petersen, “The First Berlin Border Guard Trial,” pp. 24–25.

<sup>xviii</sup> See his ruling, Landgericht Berlin ([523] 2 Js 48/90 [9/91]) of 20 January 1992, p. 136–40. Seidel noted that in citing Radbruch, he was drawing an implicit parallel with the Nazi regime whose crimes, he admitted, were more extensive than those of the GDR. “Nonetheless,” he added, “the court has no misgivings about following this legal approach in this case, for the protection of human life enjoys general validity and cannot be dependent upon a specific number of killings.”

guards' claims that they were merely following orders in taking the lives of innocent human beings were not compelling. "Even in the former GDR," Seidel concluded, "justice and humanity were understood and treated as ideals." Hence, the soldiers must have recognized the immorality of their actions: "shooting with the intent-to-kill those who merely wanted to leave the territory of the former GDR was an offense against basic norms of ethics and human association."<sup>xix</sup>

From a strictly moral standpoint, Seidel's observations cannot be dismissed out of hand. As the judge stressed in his ruling, the defendants themselves had shown in their testimony that they had known what they were doing was wrong. They admitted that they had routinely done everything they could to maintain the secrecy of shootings such as Gueffroy's after the fact. Also, demonstrating that they could have acted differently, they had refrained from using their weapons against would-be border crossers on occasions (e.g., official holidays) when such actions would have embarrassed their government.<sup>xx</sup>

But was acting immorally the same thing as breaking the law? This was the decisive question for the more famous trials to come. For on this count quite a number of German scholars *and* several appeals courts parted ways with Seidel. There was widespread agreement about the guards' moral culpability, but many experts felt that Seidel's invocation of a higher law ran right up against the prohibitions within the Basic Law and the Unification Treaty on *ex post facto* lawmaking.<sup>xxi</sup> This was the unmistakable message that was conveyed at the second of the borderguard trials, which began on 18 December 1991, and became the precedent for all subsequent proceedings. In this instance, two soldiers were charged in the 1984 shooting death of an individual who had sought to escape over the Wall into West Berlin. Both defendants were found guilty, but this time, in contrast to Seidel's more free-wheeling reasoning, the court was at pains to demonstrate that justice could be pursued only within the bounds of East German law.

In her ruling of 5 February 1992, Judge Ingeborg Tepperwein explicitly turned to the Border Law of 1982 to show that each of the defendants had exceeded his authority in shooting to kill. Tepperwein conceded that the GDR's criminal code gave the soldiers the right to use forceful measures of some kind to prevent illegal border crossings. However, she noted that the East German code was similar to the law of the Federal Republic in one crucial respect: it required that the means employed to prevent a crime be proportionate to the crime being committed. In this instance, the judge argued, "the flight of a single, unarmed person from whom there was

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<sup>xix</sup> Ibid., p. 156.

<sup>xx</sup> Ibid., pp. 156–63.

<sup>xxi</sup> For forceful critiques of Seidel's reasoning, see Wesel, *Ein Stadt vor Gericht*, pp. 33–43; Adams, "What Is Just?" pp. 298–300; and Petersen, "The First Berlin Border Guard Trial," p. 38. In March 1993 Germany's high appeals court, the Bundesgerichtshof, showed its reservations about the ruling. The court lifted the decision against one of the defendants and suspended the sentence against the other. Most significant for our purposes, the court explicitly based its judgment upon preexisting GDR law. See the ruling of 25 March 1993 (5 StR 418/92).

evidently no apparent danger for other persons or things” could not be considered a violation serious enough to justify the use of deadly force. Moreover, Tepperwein added, GDR Border Law specified that the guards seek to “preserve human life if possible” (Section 27.5). Therefore, she concluded that one could reasonably have expected the soldiers to choose only the “mildest means” available—for example, “a single, deliberate shot at the legs”—to fulfill their obligations.<sup>xxii</sup>

In her nearly exclusive emphasis upon codified East German law, Tepperwein was not only setting an important precedent. Her ruling was noteworthy for the tone that it set. Despite finding both defendants guilty, the judge suspended their sentences after reading her decision. Like Seidel, Tepperwein acknowledged that “superior orders” could not be used to excuse or to justify criminal behavior. Nevertheless, she emphasized that the two soldiers were operating in conditions that militated against completely independent action on their part. “Not selfishness or criminal energy” had led to their crime, Tepperwein contended, but “circumstances over which they had no influence, such as the political and military confrontation in divided Germany [and] the special conditions of the former GDR.”<sup>xxiii</sup> Thus, it was appropriate that their punishment be administered accordingly. As sensible as this nuanced view of the East German past might have appeared at the time, it did give rise to a tantalizing question. If the borderguards were not completely responsible for their actions, who then should also be held accountable?

### **A ‘Trial of the Century’**

It may be only a coincidence that Germany’s high appeals court, the Bundesgerichtshof (Federal Court of Justice), voted to uphold Tepperwein’s verdict in the second borderguard trial on 3 November 1992. This ruling came a mere nine days before Erich Honecker’s trial was set to begin in Berlin.<sup>xxiv</sup> Coincidence or not, the proximity of the two cases provided a fitting rejoinder to critics who had been claiming that only the least of the offenders were being made to pay for the crimes of the East German past. Earlier in the year, on 12 May 1992, the Berlin Prosecutor

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<sup>xxii</sup> See the ruling of the Landgericht Berlin ([518] 2 Js 63/90 KLs [57/91]) of 5 February 1992, pp. 50–52.

<sup>xxiii</sup> *Ibid.*, pp. 60, 63, 66–67.

<sup>xxiv</sup> In two respects, the court differed slightly with Tepperwein’s reasoning. It took issue with a claim that it was unlawful for borderguards to use “automatic fire” in preventing escape attempts. It also appealed to international law in judging East German border fortifications incompatible with the GDR’s participation in the International Convention on Civil and Political Rights. Yet, for our purposes, the high court’s ruling was most significant in upholding Tepperwein’s use of East German law. For the court’s decision (5 StR 370/92), see *Neue juristische Wochenschrift*, n. 2 (1993), pp. 141–49. In contrast to my emphasis on domestic law, this trial and related proceedings have been analyzed from the standpoint of international law in an informative essay by Gunnar Schuster, “The Criminal Prosecution of Former GDR Officials” (unpublished).

General's office had released a nearly 800–page indictment which charged Honecker and five other defendants with the crime of “collective manslaughter.”<sup>xxv</sup> The indictment maintained that, as members of the GDR's secretive national Defense Council, Honecker and former Secret Police Chief Erich Mielke, Minister-President Willi Stoph, Defense Minister Heinz Keller and his chief-of-staff Fritz Streletz, and Suhl District Party Secretary Hans Albrecht had enjoyed “unlimited influence” in determining how their state's border was fortified. They had been responsible for all of the decisions, from the selection of soldiers to the deployment of weapons and exploding mines, that ensured that the border regime ran ‘like clockwork.’ Hence, the indictment held, they, and not the guards on the periphery of the chain of command, should be considered the “key figures in everything that happened.”<sup>xxvi</sup>

These charges were a far cry from the guilt by association that one might have tied to an *Unrechtsstaat*. The indictment provided a detailed outline of the procedures of the National Defense Council and painstaking descriptions of 68 of the hundreds of killings that had taken place on the inter-German border between 1961 and 1989. In addition, the document's authors acted like court historians in meticulously linking each of the defendants to his crimes. On 12 August 1961, the indictment demonstrated, Honecker himself, in the presence of Mielke and Stoph, had given the order that had led to the construction of the Berlin Wall.<sup>xxvii</sup> This decision had then led to numerous follow-up meetings—on 20 September 1961, 29 November 1961, 6 April 1962, 13 June 1963, 23 October 1969, 14 July 1972, and so forth, reported in abundant historical detail—in which all of the defendants had eventually taken part in “further steps to increase the security of the border.” At one particularly notable meeting of the National Defense Council, on 3 May 1974, Honecker had supposedly endorsed the “unhampered use” of firearms to prevent escapes and called upon his coleaders to “praise those comrades who used their weapons successfully.”<sup>xxviii</sup>

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<sup>xxv</sup> The German term is *mittelbare Mittäterschaft*.

<sup>xxvi</sup> *Anklageschrift, Staatsanwaltschaft bei dem Kammergericht Berlin*, pp. 770–71. I am grateful to the Berlin Prosecutor General's Office for providing me with the, normally confidential, sections of the indictment dealing with the “legal justification [*rechtliche Würdigung*]” of the case.

<sup>xxvii</sup> For historical evidence supporting this position, see Peter Möbius and Helmut Trotnow, “Das Mauer-Komplott: Honecker verschärft die Teilung von Tag zu Tag,” *Die Zeit*, 16 August 1991, p. 13; and Wolfgang Leonhard, “Erich Honecker und die Berliner Mauer,” *Kursbuch*, n. 111 (February 1993), pp. 125–31.

<sup>xxviii</sup> See the short form of the indictment, reprinted in Peter Richter, *Kurzer Prozeß* (Berlin: Elefanten Press, 1993), pp. 145–51. (This version of the indictment was released on 30 November 1992. The court later reduced to 12 the number of charges against the defendants to simplify the proceedings.) For historical evidence supporting the indictment's reasoning, see Werner Filmer and Heribert Schwan, *Opfer der Mauer: Die geheimen Protokolle des Todes* (Munich: C. Bertelsmann, 1991), pp. 373–94.

Of course, at no time can the Prosecutor General's office have underestimated the difficulty of trying the GDR's leaders for these offenses.<sup>xxix</sup> With the exception of Admiral Dönitz, Honecker was, as commentators liked to point out, the first German head-of-state to be put on trial in over 800 years. Indeed, during the first half of 1992, no one could even be sure whether the chief defendant would be present in the courtroom to hear the charges against him. With national unification, Honecker had fled to Moscow where he had found refuge in the embassy of the Republic of Chile; his return to Germany literally required the fall of the Soviet Union and heavy diplomatic pressure on the part of the Kohl government. Nor was Honecker's presence in Berlin—he was ironically held in the same Moabit prison where he had once been confined by the Nazis—bound to make the proceedings any easier. As the 'trial of the century' began, the world-wide media attention and high emotions that converged upon the German capital guaranteed that Kohl's and Kinkel's hopes of avoiding a political spectacle would be tested.

From the standpoint of the defense, therefore, conditions were ideal for suggesting that a miscarriage of justice was at hand. In his one and only statement to the court, on 3 December 1992, Honecker gave one of the more spirited speeches of his career—amazing in view of his past oratorical standards—in which he portrayed himself and his colleagues as the victims of a cruel twist of historical fate. It was not, he insisted sarcastically, "'criminal' individuals, such as I and my comrades," who bore responsibility for the wall in Berlin and the deaths at the border. Rather, the roots of this tragedy lay in a world-historical conflict that had begun with Hitler's rise in 1933 and culminated in the formation of two opposing German states after World War II and the hysteria of the Cold War. Now, the wrongs of the past were about to be repeated with his own conviction. "One would have to be blind or consciously close one's eyes to the events of the past," Honecker lectured his accusers, "to fail to recognize that this trial is a political trial of the victors over the defeated, [or] to fail to recognize that it amounts to a politically motivated misrepresentation of history."<sup>xxx</sup>

As we shall see, these would not prove to be insuperable objections for the courts. But, there was a more serious complication for those seeking to prosecute the East German leadership and a fact that nobody could deny about the majority of the defendants—their advanced age. Within the Basic Law, there is arguably no more important guarantee than its opening promise

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<sup>xxix</sup> For differing accounts of the trial, see Jacqueline Hénard, *Geschichte vor Gericht* (Berlin: Corso bei Siedler, 1993), pp. 57–74; Richter, *Kurzer Prozeß*, pp. 15–17; Erich Selbmann, *Der Prozeß* (Berlin: Spotless, 1993), pp. 6–70; Wesel, *Ein Staat vor Gericht*, chaps. 1, 2, 5, passim; Tina Rosenberg, *The Haunted Land* (New York: Random House, 1995), chap. 8; and "On with the Show," *The New Yorker*, v. 68, n. 11 (11 January 1993), pp. 23–26. The last account was penned by the wife of one of Honecker's attorneys.

<sup>xxx</sup> Honecker's statement before the court is reprinted in Richter, *Kurzer Prozess*, pp. 159–75. Feigning modesty, Honecker advised the court (p. 167) that the indictment against him gave him no choice, "without being an historian, [but] to recapitulate the history that had led to the [construction of the] Wall."

(Art. 1, § 1) to protect “human dignity.”<sup>xxxi</sup> Given the rapidly deteriorating health of many of the defendants, German prosecutors were aware that a long and exhausting trial would amount to a violation of this right. Thus, on 13 November, only one day after the trial had begun in Berlin, the court temporarily suspended all proceedings against Willi Stoph, since the former prime minister was experiencing heart trouble. Only a few days later similar steps were taken in the trial of Erich Mielke, on the grounds that the one-time police chief, also in failing health, was simultaneously being tried for another offense (about which we shall comment later).<sup>xxxii</sup>

In both of these cases, it is noteworthy that there was little if any public opposition to the court’s actions. When the attorneys for the defense requested that the same protections of German law be applied to Honecker, however, the public reaction was quite the opposite. Perhaps it was the fact that Honecker, more than any other figure, seemed personally to embody the crimes of the GDR government. Also, Honecker’s health problems were more serious than those of the other defendants. Since most, although not all, medical experts gave the GDR’s former leader less than a year to live because of a cancerous tumor that was spreading in his liver,<sup>xxxiii</sup> it was clear that to postpone his case was to ensure that he would never be tried.

For weeks the contending attorneys engaged in macabre debates about the condition of the defendant’s liver. How *much* pain was he experiencing? How big *was* his tumor? How *fast* was it growing? When *would* it kill him? As these battles ensued, the presiding judge, an avowed anticommunist, Hansgeorg Bräutigam, seemed almost fixated upon bringing about Honecker’s conviction, regardless of his health or mental state. Nevertheless, on 12 January 1993 Berlin’s constitutional appeals court intervened to stop the proceedings.

From the first, the judges on the court had asked themselves what the point of the trial would be were the defendant not to be around to face possible punishment. Their conclusion was a significant statement about the German conception of the rule of law. If the trial were allowed to become an “end in itself [*Selbstzweck*],” they reasoned, the FRG would be as guilty of violating the human dignity of its citizens as was the GDR. “The individual,” as the judges put it, “[would] become a simple object of state measures,” and a fundamental distinction between the two political orders would be obscured.<sup>xxxiv</sup> As a result, the court chose not only to postpone the trial but also to dismiss all of the charges against Honecker on health grounds.

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<sup>xxxi</sup> See Kommers, “Basic Rights,” p. 114.

<sup>xxxii</sup> All charges against Stoph were finally dropped for reasons of his poor health in July 1993, followed by the dismissal of charges against Mielke for similar reasons a year later. Mielke was incarcerated, however, for his conviction in the other case. In February 1995, the Federal Constitutional Court rejected his request for an appeal of the conviction.

<sup>xxxiii</sup> Honecker failed to live up to this prediction by only half a year; he died in Chile on 29 May 1994.

<sup>xxxiv</sup> See VerfGH Beschl. (55/92), reprinted in *Juristenzeitung*, n. 5 (1993), pp. 259–61. The court based its decision squarely on Article 1 of the Basic Law. For a detailed treatment of the

For many Germans, the decision to free Honecker was an occasion for outrage. The minister-president of Mecklenburg-Vorpommern, Berndt Seite, proclaimed Honecker's subsequent departure for Chile a 'slap in the face' of the victims of the Wall. Likewise, Saxony's outspoken environmental minister, Arnold Vaatz, claimed that the judgment reinforced earlier suspicions about the borderguard trials: "One hangs the little guy, but lets the big shot get away."<sup>xxxv</sup> Seeming to lend fuel to his critics' arguments, Honecker himself was quick to proclaim victory upon his arrival in Santiago.

But was this really a victory for Honecker? More to the point, did the constitutional court's decision confirm the cynical view that the *Rechtsstaat* was incapable of responding to its citizens' demands for judicial retribution? Despite the loss of the trial's most prominent participant, it is essential to note that the courts still abided by the standards that had been used in the Prosecutor General's indictment of May 1992. More important than the trial of Honecker himself, the proceedings against the three healthy members of the GDR's National Defense Council continued after his departure. Finally, on 16 September 1993, Ke ler, Streletz, and Albrecht were all found guilty of the charges against them, the first two for being "instigators" in the border deaths and the latter for being an accessory.

These convictions present a provocative picture of the trial as it might have been, had Honecker only been sufficiently healthy to endure the proceedings. Throughout the intervening eight months following his departure and leading up to this verdict, the three defendants had sought to maintain, like Honecker before them, that they were not individually responsible for the shootings at the Wall. The Soviet Union, it seemed, had been the prime mover behind the construction of the barrier in August 1961; East Germany's leaders had done nothing more than to act upon their government's sovereign right, and its obligations to the Warsaw Treaty Organization, to ensure their country's external security. If there had been deaths along the inter-German border, these incidents were the regrettable consequence of years of hostility between the eastern and western military blocs.<sup>xxxvi</sup>

These claims were not without some historical foundation. Moscow had played a decisive role in the erection of the Wall, and the GDR had been at the center of some of the Cold War's

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legal issues, see Klaus Lüderssen, *Der Staat geht unter—das Unrecht bleibt?* (Frankfurt am Main: Suhrkamp, 1992), pp. 98–105. For reasons beyond the purposes of this essay, some observers contended that the court exceeded its competence in coming to this judgment. Among the voluminous critical accounts, see D. Meurer, "Der Verfassungsgerichtshof und das Strafverfahren," *Juristische Rundschau*, n. 3 (March 1993), pp. 89–95; R. Bartlsperger, "Einstellung des Strafverfahrens von Verfassungs wegen," *Deutsches Verwaltungsblatt*, v. 108, n. 7 (1 April 1993), pp. 333–49; and J. Berkemann, "Ein Landesverfassungsgericht als Revisionsgericht," *Neue Zeitschrift für Verwaltungsrecht*, v. 12, n. 5 (15 May 1993), pp. 409–19.

<sup>xxxv</sup> *Süddeutsche Zeitung*, 14 January 1993, and *Süddeutsche Zeitung*, 16/17 January 1994.

<sup>xxxvi</sup> Ke ler's and Streletz's defense arguments are reprinted in Richter, *Kurzer Prozeß*, pp. 207–14, 222–31.

greatest tensions. However, in coming to his judgments against Ke ler, Streletz, and Albrecht, Hans Bo , who replaced Bräutigam as presiding judge on 7 January 1993, refused to be persuaded by these arguments.<sup>xxxvii</sup> Applying the same legal standards and emphasis on preexisting law that Tepperwein had used in the second borderguard trial, he contended that the members of the National Defense Council had played a key role in deciding how the inter-German border was secured. They knew, Bo asserted, that the killing of their citizens “was wrong [unrecht],” since even GDR law recognized the primacy of protecting human life over serving state interests. But, he added, “[the defendants] chose to put up with this wrong out of political considerations.”<sup>xxxviii</sup>

Bo conceded that the trial would have been easier had experts been able to locate the smoking gun that many had hoped to find in the top-secret protocols of the National Defense Council, that is, an explicit order (*Schießbefehl*) requiring the borderguards to shoot *to kill*. In any case, the evidence showed that the members of the Council assumed that such extreme measures would be used. They knew, he noted, that “their actions would lead to deaths on the border. They consciously accommodated themselves to the possibility of such deaths.”<sup>xxxix</sup> In this sense, there was an identifiable ‘causal link’ between their actions and the soldiers’ violations of the GDR penal code: “Without their decisions and commands, the succeeding chain of command would never have been set into motion and the actions of the border soldiers that led to the deaths of the victims would never have followed.”<sup>xl</sup>

In contrast to the turmoil of the trial’s early stages when Honecker was in the courtroom, Bo ’s ruling was notable for the care with which he delivered it. The judge acknowledged the awkwardness of his position as a western German seeking to come to a satisfactory judgment on the East German past. “It would have been better,” Bo advised his listeners in his oral statement on 16 September 1993, “if East Germany had tried its own leaders.” Unfortunately, this was impossible: “German unification came far too quickly to allow for this.”<sup>xli</sup> Partly for this reason, Bo chose to take mitigating circumstances into account in sentencing Ke ler, Streletz, and Albrecht to milder jail terms than those requested by the prosecution. Without excusing any of the officials’ actions, he noted that the defendants were themselves “prisoners of German postwar history and

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<sup>xxxvii</sup> Bräutigam’s dismissal from the case was as odd as some of the proceedings. The judge was not removed for reasons of political bias, as one might have expected, but instead because he had sought, bizarrely, to obtain Honecker’s autograph for a court official.

<sup>xxxviii</sup> For the main sections of the court’s decision (Landgericht Berlin, Urteil vom 16.9.93—[527] 2 Js 26/90 Ks 10 [92]), see “Urteil gegen ehem. Mitglieder des Nationalen Verteidigungsrates der DDR,” *Neue Justiz*, n. 5 (1994), pp. 210–14.

<sup>xxxix</sup> *Ibid.*, p. 213.

<sup>xl</sup> *Ibid.*, p. 212. Also see *Süddeutsche Zeitung*, 17 September 1993; *The Week in Germany* (German Information Center), 24 September 1993; Peter Jochen Winters, “Ein Sieg der Gerechtigkeit,” *Deutschland Archiv*, n. 10 (1993), p. 1121–22.

<sup>xli</sup> United Press International report, 16 September 1993.



prisoners of their own political convictions.” In the absence of the Cold War, the judge reasoned, there would have been no division of Germany, and therefore none of these individuals would presumably have committed the crimes for which they had been convicted.<sup>xlii</sup>

At this point, the Honecker trial might have come to an end. However, given the controversial nature of the proceedings, Bo chose to postpone the implementation of the three sentences until the Bundesgerichtshof had the opportunity to review his decision. On 26 July 1994 the court delivered its verdict, not only upholding the decision on nearly all counts but also taking his conclusions one step further. Whereas Bo had held that Ke ller, Streletz, and Albrecht had only indirectly participated in the killings at the inter-German border (as “instigators” and as an “accessory,” respectively), the higher court chose to underscore their individual culpability by labeling them “perpetrators [ *Täter*].” It would be an inadequate reflection of the three individuals’ roles as “behind-the-scenes actor[s] at the peak of a hierarchy,” the judges contended, “were they only to be treated as participants” while the borderguards were convicted for having “committed the [crimes].”<sup>xliii</sup> To be sure, in modifying the lower court’s decision, the Federal court altered only one of the defendants’ sentences: Albrecht was sentenced to serve an additional seven months. But the meaning of the ruling was clear. The three remaining members of the National Defense Council were as responsible for the deaths at the Wall—indeed, the fact they received jail terms suggested even greater culpability—as the soldiers who had acted on their behalf.

### **Architects of German Unity**

For those who had expected nothing to come of the post-GDR trials, this judgment against Honecker’s colleagues could not be easily ignored. True, some observers may have wished for an even more dramatic statement about the significance of these convictions.<sup>xliv</sup> Had

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<sup>xlii</sup> *The Week in Germany* (German Information Center), 24 September 1993.

<sup>xliii</sup> The complete sentence is: “Der Bundesgerichtshof ist der Auffassung, da es dem objektiven Gewicht des Tatbeitrages des Hintermannes an der Spitze einer Hierarchie nicht gerecht würde, wenn dieser nur Teilnehmer wäre, während die unmittelbar Handelnden, hier die Grenzsoldaten, wegen täterschaftlichen Handelns verurteilt werden müssen.” For the court’s decision, see the Bundesgerichtshof press release of 26 July 1994 (As: 5 StR 98/94).

<sup>xliv</sup> Technically, this was not the end. On 10 January 1995, the Berlin Prosecutor General announced the indictment of seven former members of the SED Politburo, including the party’s last general secretary, Egon Krenz. The new indictment was welcomed by some observers as proof of the FRG’s continuing commitment to holding the GDR’s leaders accountable for their actions. From this writer’s standpoint, however, the proceedings could be faulted for not living up to the more exacting standards of the Honecker trial. First, the defendants were not charged with participating in the shooting deaths at the Wall but rather for the more amorphous offense of not actively seeking to prevent these crimes. Second, some of those individuals included in the indictment (e.g., former cultural chief, Kurt Hager) seem to have been only very marginal participants in the crimes.

not a major part of German history also been on trial when Honecker and his associates sat in the docks? Did not the courts have a responsibility to help all Germans, and particularly eastern Germans, to make more sense of their country's troubled history? The simple, and correct, response to these questions is that the courts' sole charge, as servants of the *Rechtsstaat*, was to determine the guilt or innocence of the accused. However, this is not to say that Germany's judges made no contribution to the 'working out' (*Aufarbeitung*, to use the popular terminology) of their country's past. They just may not have recognized it as such.

We have already encountered some examples of what the courts thought about the record of East German communism. Adherence to the strictures of the Basic Law meant that German judges were practically required—at least, from the second borderguard trial onward—to approach the 40-year history of the GDR in more exacting terms than those allowed by the ambiguous concept of the *Unrechtsstaat*. As the Federal Court of Justice reasoned in upholding the convictions in the borderguard trial, representatives of the East German state apparatus could be tried precisely because the GDR was a far more complex entity than the lawless state that had existed under the Nazis. For all of its shortcomings, the codified law had meant something in East Germany. “[U]nlike under the national socialist dictatorship, there was no doctrine in the GDR according to which the simple whims of those who happened to be in power could become law.” “Laws,” the court insisted, deliberately citing a passage from the East German constitution, “were binding.”<sup>xlv</sup>

As an interpretation of the GDR's past, this statement was enlightening. The court was saying that even in a dictatorship such as the GDR, specific individuals had had a choice in committing the crimes for which they were accused. They could have followed the law but they had consciously chosen to do wrong. By itself, this was a provocative corrective from a legal and even historical standpoint. Yet, if we meditate on the implications of this perspective for an even larger issue, the ongoing challenge of German unification, it is conceivable that the judges' stand was significant from a social and political standpoint as well. After all, if some individuals had knowingly violated their country's laws, was it not reasonable to conclude that there were other eastern Germans, even former soldiers and politicians, who had just as deliberately chosen to do the right thing? Assuming this premise to be true, might not the post-GDR trials have something to say about the terms according to which the eastern German population should be integrated into the Federal Republic?

Over 30 years ago, Otto Kirchheimer anticipated the courts' social function in a classic work, *Political Justice*. “Successor justice,” he wrote, “is both retrospective and prospective. In laying bare the roots of iniquity in the previous regime's conduct, it simultaneously seizes the

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<sup>xlv</sup> See the ruling of 3 November 1992 (5 StR 370/92), cited in *Neue juristische Wochenschrift*, n. 2 (1993), p. 146.

opportunity to convert the trial into a cornerstone of the new order.”<sup>xlvi</sup> At the time he was writing, Kirchheimer was primarily concerned about the abusive ends to which legal procedures could be put by successor regimes, and he warned against allowing the courts to become mere tools in the replacement of one dictatorship with another. This was not a problem with the Federal Republic of Germany. Nevertheless, Kirchheimer’s insight about the courts’ prospective function rings true when one views the Honecker trial and others like it as possible cornerstones in the construction of a united Germany.

Let us imagine that, instead of focusing on specifically punishable crimes under the codified law of the GDR, Germany’s courts had followed the model of retributive justice enunciated by Theodor Seidel at the first borderguard trial. In this case, arguably, Honecker and his colleagues would have been convicted not so much because of the illegality of their actions as by virtue of their participation in an immoral and unjust state apparatus. Such a trial would have had some advantages. In applying Radbruch to the GDR, the courts would have been able to cut right to the heart of East Germany’s status as an *Unrechtsstaat*. Along the way, many of the cumbersome and tedious aspects of the German legal process—the “pedantry and juristic nit-picking,” to quote Neal Ascherson<sup>xlvii</sup>—would have been eliminated.

However, if one takes the courts’ prospective function seriously, there was also an undeniable drawback to this approach. It lay in the implications of the *Unrechtsstaat* for anyone who had ever been associated with the East German state. In a world in which guilt was not clearly identified with the violation of specific laws, there was very little to prevent many eastern Germans from becoming citizens of the Federal Republic with a nebulous cloud of collective responsibility hanging over them. At its height, the SED alone had over 2.3 million members. If one threw into this equation all of the members of the country’s state bureaucracy, its armed forces, and its police, not to mention the hundreds of thousands of individuals who had secretly spied on their friends and families for the Ministry of State Security, the list of the guilty might include a third of the East German population.

Lest this danger seem overly abstract, let us remember that even many of the GDR’s greatest critics had reservations about how finely the line could be drawn between guilt and innocence in their former homeland. Consider social activist Jens Reich’s bleak assessment of the Honecker trial. “Every expectation of punishment is fruitless,” Reich wrote in late 1992, as the trial began, “because we were participants. We consented to everything. We looked away. We held our tongues. We rolled our eyes. We knew everything better. Many even took part. Only a

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<sup>xlvi</sup> *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), p. 336.

<sup>xlvii</sup> *The Independent*, 2 August 1992.

miserable few sought to stop what was happening.”<sup>xlvi</sup> Most likely, Reich did not intend to suggest that the passivity of the GDR’s citizens over 40 years of communist dictatorship or their tacit consent in their government’s practices was quite the same thing as their leaders’ much more direct involvement in the killings at the Berlin Wall. Still, it is not hard to see how his well-meaning image of daily life in the GDR could convey a misleading message about the eastern German population. Although the FRG’s new citizens were every bit as German as their western counterparts, it seemed to imply that they were tainted as a result of their ties to a dubious past.

In contrast, the courts that prosecuted Honecker and his associates were offering a potentially more hopeful message about the German future, even if this was not their explicit intention. In insisting upon a strict definition of criminal responsibility, they were making a distinctive claim—not everyone was guilty. At first glance, this may not seem like an unusual pronouncement. But if one takes into account the historical context of the courts’ rulings, there is good reason to think that the *presumption* of innocence would have a special relevance in eastern Germany. The early 1990s was a time of intense social and economic disruption for the majority of the GDR’s former citizens. Once the exhilaration attending the fall of communism had worn off, many felt that they had been unfairly relegated to a second-class status vis-à-vis their western cousins. In particular, public opinion polls revealed widespread skepticism about whether eastern Germans would be entitled to the same legal protections as their relations in the West.<sup>xlix</sup> In this instance at least, the careful and consistent rulings of judges like Tepperwein and Bo held out the promise that equal standards would be applied to all.

In setting this example, the courts may have also conveyed a salutary message about the purposes of the German *Rechtsstaat*. Even for those who were convicted of their crimes (or those who were sympathetic to their plight), the way the judges reached their verdicts bespoke a legal culture profoundly different from that which had been dominant in the GDR. To see the point, one has only to consider the treatment accorded Honecker. Had his health only been better, in all probability the East German leader would have been found guilty of the same offenses as Ke ler, Streletz, and Albrecht. However, precisely because he could not have survived his trial, Honecker—the man, and not the former SED chief—was accorded the protections of the Basic Law’s commitment to human dignity. Whereas state interests had frequently defined the administration of justice in the GDR, the mercy and compassion that the

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<sup>xlvi</sup> “À la lanterne?” *Kursbuch*, n. 111 (February 1993), p. 11.

<sup>xlix</sup> In one study, the Allensbach Institute found that 73 percent of the eastern Germans it interviewed were unconvinced that the law was applied equally to all Germans; 72 percent felt themselves personally not well protected. See *Frankfurter Allgemeine Zeitung*, 8 March 1995. On the continuing problems of reuniting the two German populations, see the epilogue to the paperback edition of my study, *Germany Divided: From the Wall to Reunification* (Princeton: Princeton University Press, 1994), pp. 229–43.

courts showed in this instance demonstrated that a different standard prevailed in the Federal Republic. The value of human life outweighed the public clamor for retribution.

Then, too, hopeful lessons could be derived from the courts' readiness to take extenuating circumstances into account in handing down their sentences. It is notable, for example, that out of the scores of borderguard trials conducted between 1991 and 1995, only two soldiers were actually sentenced to serve time in jail and then only because their crimes were unusually heinous. As we have seen, similarly lenient standards were applied in the sentencing of Keller, Streletz, and Albrecht.

For these reasons, one may cautiously side with those legal experts who have observed—as did the ex-president of the Federal Constitutional Court, Ernst Benda, during the proceedings against Honecker—that the post-GDR trials will ultimately be a positive 'learning process' for the FRG's new citizens.<sup>1</sup> No doubt, those who suffered most under 40 years of East German communism will still need a while before they fully comprehend the benefits of the *Rechtsstaat*. With time and patience, however, it is reasonable to expect that the great majority of the GDR's former citizens will come to appreciate the virtues of the due observance of the law.

### **The Limits of the Rechtsstaat**

There were, in short, some very positive lessons to be drawn from the Honecker trial. For the sake of clarity, however, it is advisable to conclude this essay with a few brief reflections about what this trial was not and could not have been.

We have argued in this study that the case against Honecker and the other members of the National Defense Council was consistent with the basic principles of the rule of law as practiced in the FRG. However, this is not to say that *all* of the trials conducted after the GDR's fall necessarily lived up to this standard. Although this is not the place to go into the case histories of all of the post-GDR trials, there certainly were instances—particularly in the early years after unification—in which the rush to hold East German officials accountable for their misdeeds seems to have led to misplaced judgments. For example, critics have almost unanimously singled out the 1991 trial of party boss Harry Tisch. In this instance, the one-time head of the SED's dictatorial trades union organization was tried and convicted solely for the minor offense of having misused union funds, when many of the GDR's citizens felt he was guilty of more serious crimes. Similar criticisms were raised about the handling of the 1992–93 trial of Erich Mielke. In this case, the court—notably with Theodor Seidel presiding—seemed so set upon obtaining a conviction that it

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<sup>1</sup> See "Interview mit Ernst Benda," *Deutschland Archiv*, v. 25, n. 12 (1992), p. 1341.

reached further back than ever before into the German past to find Mielke guilty of complicity in the murder of two policemen in 1931.

Additionally, there were ambiguities in the legal standards that the courts brought to bear in other prominent cases. Throughout the early 1990s, a number of former East German intelligence officers, including the notorious master-spy Markus Wolf, were prosecuted for their part in conducting espionage against the Federal Republic. However, what made these trials both unusual and controversial was the way the courts justified the proceedings. Notably, Wolf and his associates were charged with having broken not their own country's laws but instead West German statutes in effect before 1989. Not surprisingly, when these individuals were subsequently found guilty of the unlikely charge of *treason* against the FRG, the courts' critics were quick to fault the convictions for violating the spirit of *nulla poena sine lege* and the letter of the Unification Treaty.<sup>li</sup> In this instance, the critics may have been vindicated. In a historic decision on 23 May 1995, the Federal Constitutional Court ruled that the former spies could not be legitimately prosecuted for activities undertaken on behalf of another government.<sup>lii</sup>

It is also important to emphasize that the Honecker trial could never provide that form of reckoning with the communist past that was probably most sought after in the East—the achievement of justice in any absolute sense of the term. It is not hard to understand and to sympathize with the motivations of many eastern Germans in pressing the Federal government to punish their former leaders. The victims of four decades of communist rule would not sleep well until their oppressors had been made to bear full responsibility for their part in the German dictatorship.

Still, it would be illusory to imagine that the law alone could be a sufficient means for achieving this end. No amount of punishment could make up for the suffering and pain of those whose friends and relatives had died at such godforsaken locations as the Berlin Wall. And no law could have been devised for the FRG to deal in any completely satisfying manner with the criminal activities of another state. In this sense, dissident Bärbel Bohley was probably right when she suggested that Germany's courts were better suited to serving the cause of the *Rechtsstaat* than

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li See Bruno Simm and Klaus Volk, "Der Spion der in die Kälte kam," *Neue juristische Wochenschrift*, n. 14 (1991), pp. 871–75; and Gunter Widmaier, "Verfassungswidrige Strafverfolgung der DDR-Spionage," *Neue juristische Wochenschrift*, n. 39 (1991), pp. 2460–64. In contrast, for a provocative defense of the trials, based on both international law and the special inter-German relationship, see Gunnar Schuster, "Verfassungs- und völkerrechtliche Fragen der Bestrafung von DDR-Spionen nach der Wiedervereinigung Deutschlands," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, v. 51, n. 3 (1991), pp. 651–82.

lii The court's ruling did not, however, amount to a blanket amnesty. The court excluded former West German citizens from the judgment. Additionally, it held that East German case officers and deep-cover officers (*Offiziere im besonderen Einsatz*), among others, were liable to criminal persecution if they acted on West German soil. In the latter cases, however, the court recommended leniency in sentencing, given the historical context in which these activities were conducted. Judgment of 15 May 1995, Second Senate, Federal Constitutional Court (transcript).

meeting everybody's demands for justice. According to the definition of the former term that we have used in this essay, however, the courts' example in the cases surrounding the Honecker trial still seems to have been a significant accomplishment in itself.