# THE STATUS OF INTRA-GERMAN TRAFFIC IN POLITICAL PRISONERS UNDER INTERNATIONAL LAW

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Chemicals, plastics, precision instruments, and textiles: Conventional industrial products such as these pass in impressive volume from the factories of the German Democratic Republic (GDR) to the markets of its capitalist Western neighbor, the Federal Republic of Germany (FRG).[1] Since 1963, however, a highly unorthodox export of a radically different kind has also been vended by the GDR to the FRG in exchange for Western goods and "hard" currency. The product? East German political prisoners. The price? Currently, from around $15,000 to $75,000 per head.

Although shrouded in secrecy by both the Bonn and East Berlin governments, the existence of the intra-German traffic in political prisoners is, as a result of leaks to the Western press, a matter of common knowledge on both sides of the Elbe River.[2] Yet, perhaps out of deference to the sensitivities of both German governments,[3] or perhaps as a result of simple oversight, scant critical

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1. For a statistical survey of the GDR's export-import trade with the FRG, see STAATLICHEN ZENTRALVERWALTUNG FÜR STATISTIK, STATISTISCHES JAHRBUCH 1979 DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK 23-48 (1979). For a discussion of recent developments in intra-German trade, see Whetten, *Scope, Nature, and Change in Inner-German Relations*, 57 INTERNATIONAL AFFAIRS 60, 71-75 (1980-81).

2. N.Y. Times, Oct. 28, 1979, at L5, col. 1. The Bonn Government was initially open with the press concerning its transactions with the East Germans, but fell silent when it became "feared that the Communists would break off the arrangement once the facts became known." *Id.*, Feb. 1, 1966, at A4, col. 4; *id.*, Aug. 22, 1965, at A21, col. 5. On the stream of leaks that revealed the traffic, see Der Tagesspiegel (W. Berlin), June 22, 1976, at 3, col. 1.

3. Both the West and East German governments are loathe to publicize the arrangements. West German Chancellor Helmut Schmidt in his 1980 State of the Nation Address made a typically oblique reference to the political prisoners who "with our [West German] assistance" were permitted to leave the GDR. 13 DEUTSCHLAND ARCHIV 549, at 552 (1980). Official West German commentaries style the exchanges as "Vorzeitige Entlassung durch

scrutiny has been trained upon the compatability of the intra-German exchange arrangements with the rules of international law, particularly those rules to which one or both states have subscribed in international human rights agreements.[4] This Article ventures an initial foray into that gap.[5]

At the risk of sacrificing surprise and suspense for clarity's sake, mention is made here of the structure and thrust of this investigation. After presenting a short history of the prisoner exchange arrangements, this Article will analyze their legality: first, under a series of formal international agreements; and, second, under generally accepted principles of international law. From this analysis will emerge a two-pronged conclusion: (1) the intra-German exchange arrangements as such probably *do not* violate international law; and, (2) although the framework of arrangements itself may pass juridical inspection, it is anchored upon a bedrock of flagrant human rights violations. This mooring of an apparently legal operational framework to a bedrock of patent illegalities gives rise to numerous difficult conceptual, ethical and political problems. As a possible solution to these problems, an international covenant against state trafficking in human beings for material and political concessions will be proposed and discussed near this Article's close.

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besondere Bemühungen der Bundesregierung" [Premature Release Achieved through the Special Efforts of the Federal Government]. Der Tagesspiegel (W. Berlin), April 30, 1978, at 3, col. 1. More detailed admissions usually stem from unattributed sources, former West German officials, and non-governmental participants in the exchanges. For a commentary sharply critical of the West German Government's refusal to acknowledge the arrangements, see Raguse, *Politische Häftlinge—ein Tabu*? 11 DEUTSCHLAND ARCHIV 586, 586-90 (1978); N.Y. Times, Oct. 6, 1979, at A1, col. 3; *id.*, Oct. 28, 1979, at L5, col. 1. The reasons for the shroud of silence are probed in Naimark, *Is It True What They're Saying About East Germany*? 23 ORBIS 549, at 572 (1979). *See also* Christian Science Monitor, April 26, 1978, at 6, col. 4 (noting that the West German press "is attentive to government guidance in such matters"); Whitney, *The Fixer*, N.Y. Times, March 20, 1977, § 6 (Magazine) 46, at 50-52; Chicago Tribune, Nov. 3, 1979, § N1 at 10, col. 6.

4. Naimark, *supra* note 3, at 553, notes that contemporary American scholarship, for example, has been blind to the entire prisoner brokerage issue.

5. The best known account of the arrangments, M. MEYER, FREIKAUF — MENSCHENHANDEL IN DEUTSCHLAND (1978), provides an engaging journalistic treatment of the intra-German dealings, but does not go to the question of their legality. Other discourses upon the arrangements tend to contain only casual, conclusory references to the parties' obligations under international law, if any mention of them at all. *See, e.g.*, Whitney, *supra* note 3, at 46-54 (perhaps the best English language discussion of the deals and the dealers); Rheinischer Merkur (Bonn-Bad Godesburg), March 9, 1979, at 2, col. 2; Frankfurter Allgemeine Zeitung, Nov. 1, 1979, at 10, col. 2.

## I. A CAPTIVE MARKET

### *A. The Barriers To Flight*

TSAR: Take steps this very instant to fence off [our land] . . . with barriers, so that not a single soul may pass the line; that not even a hare can scurry here. . . .
— Alexander Pushkin, *Boris Gudunov*

On August 13, 1961, in a dramatic pre-dawn stroke, the Government of the GDR sealed off the passageways leading from East Berlin and the outlying East German countryside into West Berlin.[6] Erected primarily to stem the ruinous flow of skilled and industrious East Germans through Berlin into the more affluent West,[7] the crude barriers emplaced around the city's three "imperialist" sectors abruptly transformed westward flight from a safe and pedestrian matter[8] into a hazardous and sometimes fatal ordeal.[9]

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6. BUNDESMINISTERIUM FÜR GESAMTDEUTSCHE FRAGEN, DIE FLUCHT AUS DER SOWJETZONE UND DIE SPERRMASSNAHMEN DES KOMMUNISTSCHEN REGIMES VOM 13. AUGUST 1961 IN BERLIN, at 28-51 (1961) [hereinafter cited as DIE FLUCHT]. *See generally*, J. RÜHLE & G. HOLZWEISSIG, 13 AUG. 1961: DIE MAUER VON BERLIN (1981).

7. "Three out of five [East German] refugees were productive workers; roughly half of them were young people aged less than twenty-five . . . . [I]n the years 1954-61 the GDR lost nearly 5,000 doctors, dentists and veterinary surgeons, over 800 judges and lawyers, nearly 17,000 schoolteachers and roughly the same number of qualified engineers and technicians. . . . [T]he aggregate loss to East Germany from 1945-61 was at least 3.6 million people, roughly equal to the entire [1970] population of Norway." D. SHEARS, THE UGLY FRONTIER 43 (1970). *See id.*, 43-46; DIE FLUCHT, *supra* note 6, at 17; J. Palenberg, Before the Wall: East German Emigration Law and Policy, 1945-61, at 74-94 (March 22, 1981) (unpublished M.A.L.D. thesis, Fletcher School of Law and Diplomacy, Tufts University). For a description of the economic cleft between the FRG and the GDR in the late 1950s, see J. DORNBERG, THE OTHER GERMANY 101-03, 106-09 (1968); J. SMITH, GERMANY BEYOND THE WALL 84-88 (1969). For an account of the sharp upswing in the GDR's fortunes caused by the errection of the Berlin Wall, see H. PACHTER, MODERN GERMANY: A SOCIAL, CULTURAL, AND POLITICAL HISTORY 341-49 (1978).

8. By July, 1958, as many as nine out of ten refugees fled the GDR by way of a casual walk or train ride to West Berlin. Bericht des Ausschusses für Bevölkerungs und Flüchtlingswesen der Beratenden Versammlung des Europarates über das Problem der Flüchtlinge aus der sowjetischen Zone Deutschlands, vorgelegt von dem Abg. Selvik (Jan. 19, 1959), *reprinted in* DOKUMENTE ZUR DEUTSCHLANDPOLITIK, Series 4, 1/1 (1958-1959), at 621-28 (Deuerlein & Nathan, eds. 1971).

9. Conservative Western estimates place the number of East Germans slain between August 1961 and December 1977 in attempts to cross the GDR-FRG border at 103, with the total rising to approximately 173 when the fatalities from along the border in Berlin are added. BUNDESMINISTERIUM FÜR INNERDEUTSCHE BEZIEHUNGEN, DDR HANDBUCH 921 (2nd ed. 1979) [hereinafter cited as DDR HANDBUCH]. The success of the GDR's deterrents to emigration can be measured in terms of the number of East German refugees registered annually in the FRG. In 1960, a total of 199,188 refugees were recorded. In the over seven months of 1961 preceding the erection of the Berlin Wall, 155,402 refugees were tallied.

Over an initial period of several months, virtually all East Germans were refused permission to cross over into non-socialist Germany.[10] In the two decades since 1961, however, numerous exceptions to the once absolute ban on westward movement have been created. The role of the GDR's system of frontier controls has thus been changed from that of a hermetic seal into that of a selectively permeable membrane.[11] A few well-known examples suffice to illustrate the point.

Stalwart GDR officials, prize athletes, and trusted scientists have long been able to visit the West under varying degrees of official supervision.[12] Since late 1964, elderly East Germans routinely have been permitted to enjoy periodic stays in West Germany,[13] possibly because: first, pensioners seldom abandon their benefits and friends in the GDR for a "fresh start" in the West; second, the promise of a retirement vacation in the non-socialist lands beyond the Elbe is an incentive to good behavior during their working years; and third, the defection of a pensioner saves the state a considerable sum in unpaid pension benefits.[14] Persons of every age group with close relatives in the FRG have been permitted since late 1972 to cross into West Germany for urgent family affairs (such as births, illnesses, and deaths), although the number of such visits

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Thereafter, the rate slumped to 51,624 for the remainder of 1961; 16,741 in 1962; 12,967 in 1963; 5,047 in 1970, and a mere 4,031 in 1977. Only 721 individuals successfully fled the GDR by directly assaulting the GDR-FRG or GDR/East Berlin-West Berlin border in 1977. *Id.*, at 400-01.

10. *Id.*, at 401, 1089.

11. West German records list the number of registered refugees who received authorization to emigrate from the GDR to the FRG as follows:

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| 1963 | 29,665 | 1970 | 12,472 |
| 1964 | 30,012 | 1971 | 11,565 |
| 1965 | 12,666 | 1972 | 11,627 |
| 1966 | 15,675 | 1973 | 8,667 |
| 1967 | 13,188 | 1974 | 7,928 |
| 1968 | 11,134 | 1975 | 10,274 |
| 1969 | 11,702 | 1976 | 10,058 |
| | | 1977 | 8,041 |

These totals reflect only those refugees who applied for government aid upon arrival in the FRG. *Id.*, at 1089.

12. *See generally* D. SHEARS, *supra* note 7, at 10, 15.

13. Since November 2, 1964, women over the age of 60 and men over the age of 65 have been generally allowed to travel into the West for limited periods. DDR HANDBUCH, *supra* note 9, at 202. In his 1980 State of the Nation Address, FRG Chancellor Schmidt reported that 1.4 million East German pensioners visit the FRG annually. 13 DEUTSCHLAND ARCHIV 549, 552 (1980). *See also* Whetten, *supra* note 1, at 69.

14. *See* J. DORNBERG, *supra* note 7, at 117-18; M. MEYER, *supra* note 5, at 10. State-supported invalids and accident victims enjoy the same travel privileges as normal retirees. DDR HANDBUCH, *supra* note 9, at 202.

was limited to approximately 40,000 in 1979.[15] Additionally, members of divided families,[16] undesirable social critics,[17] and an odd assortment of other individuals sporadically have been allowed to exit across the GDR's western borders.

Yet, despite these exceptions, for most East Germans the GDR's network of statutory restrictions and border fortifications presents an almost impassable barrier to westward migration. Persons of working age with no close relatives in the West are rarely granted the visas required for travel to the FRG and West Berlin.[18] The mere application for a visa can sometimes invite harassment and loss of employment.[19] While an estimated 4,000 to 6,000 East Germans successfully flee the GDR along illegal avenues of escape each year — occasionally with the aid of professional refugee-smugglers (*Fluchthilfer*)[20] and usually via third countries, as op-

15. DDR HANDBUCH, *supra* note 9, at 202-03; 13 DEUTSCHLAND ARCHIV 549, 552 (1980).

16. Roughly 26,000 persons left the GDR under the intra-German "family reunion program" between January 1970 and 1979. Frankfurter Allgemeine Zeitung, Sept. 22, 1979, at 1, col. 2. Between August 1961 and 1968, the Red Cross resettled 122,000 East Germans into the FRG as part of the family reunification scheme. J. DORNBERG, *supra* note 7, at 116. *See also* DDR HANDBUCH, *supra* note 9, at 1089.

17. *See* N.Y. Times, March 16, 1980, at A8, col. 1; *id.* Sept. 24, 1977, at A1, col. 1; [1980] KEESING'S CONTEMP. ARCHIVES, 30089-90.

18. An annotated description of the requirements imposed by the GDR's passport laws may be found in Mampel, *Bemerkungen zum Bericht der DDR an das Menschenrechtskomitee der Vereinigten Nationen* 22 RECHT IN OST UND WEST 149, 152 (1978). Generally, a passport and a visa are required, both of which may be withheld by East German authorities without explanation or appeal.

19. N.Y. Times, Oct. 6, 1979, at A1, col. 3. Despite the possibility of official retaliation, an estimated 120,000 emigration applications flooded in on East German officials in the wake of the publicity surrounding the GDR's unqualified endorsement of the Final Act of the 1975 Conference on Security and Cooperation in Europe [Helsinki Accord]. *See infra* notes 127-29. Only after the East German government warned the populace to desist did the torrent of applications subside. *See* Croan, *New Country, Old Nationality*, 37 FOREIGN POLICY 142, 148-49 (1979-80); Houston Chronicle, Nov. 6, 1976, at D2, col. 5; New York Times, Oct. 11, 1977, at A14, col. 4; Heneghan, *Human Rights Protests in Eastern Europe*, 33 THE WORLD TODAY 90, 97 (1977).

20. Villified by East German commentators as "*Menschenhändler*" (man-traffickers) but condoned by the FRG, refugee-smugglers have been the focus of a long, bitter dispute between Bonn and East Berlin. *See generally* Klose, *Kriminalisierbarkeit der Fluchthilfe*, 9 ZEITSCHRIFT FÜR RECHTSPOLITIK 28-32 (1976); Schroeder, *Die Kriminalisierung der Fluchthilfe ist unzulässig, id.*, at 32-34; J. DORNBERG, *supra* note 7, at 111-14; Heimeshoff, *Die Schutzpflicht der Bundesrepublik gegenüber Fluchthelfern*, 1975 DEUTSCHE RICHTERZEITUNG 111-12; O. KIMMINICH, FLUCHTILFE UND FLUCHT AUS DER DDR IN DIE BUNDESREPUBLIK DEUTSCHLAND (1974); Wünsche, *Völkerrechtliche Aspekte der Verletzung internationaler Abkommen durch die Tätigkeit von Menschenhändlerorganisationen*, 1976 N.J. 696-700. A

posed to directly across the heavily policed intra-German borders[21] — they make their attempts at considerable risk to life, limb and liberty.[22]

Severe criminal penalties are visited upon apprehended would-be refugees. Persons convicted of planning, attempting, or accomplishing an unauthorized border-crossing face imprisonment of up to eight years in serious cases,[23] with a possible sentence of up to five additional years if they avail themselves of the services of a Western refugee-smuggler.[24] The hazards of flight preparation are magnified by a law which requires all persons who possess reliable information concerning a prospective illegal departure of a serious type to report their suspicions to public authorities immediately.[25] More forbidding than the statutory deterrents, however, is the increasingly elaborate, brutal, and effective latticework of border fortifications strewn around the GDR.[26] According to a 1979 West German Ministry of the Interior account, along the 1346 kilometer (835 mile) East-West German border alone, there were an estimated 1,211 kilometers of metal rail fencing wired to electronic se-

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1961 decision by the GDR's highest court flatly labelled German refugee-smuggling a violation of international law. Urteil des Obersten Gerichts vom 2. August 1961 —1 Zst (1) 2/61 — gegen Adamo und andere, 1961 N.J. 550, 551. *See also* Steiniger and Reintanz, *Menschenhandel — Verbrechen im Sinne des Völkerrechts*, 1961 N.J. 556-61.

21. *See infra* notes 26-27. Only about ten per cent of the East German refugees registered by the FRG reportedly brave the GDR's frontier barriers directly. Volkmer, *East Germany: Dissenting Views during the Last Decade*, in OPPOSITION IN EASTERN EUROPE 120 (R. Tökés ed. 1979). *See also* L.A. Times, March 23, 1979, at A6, col. 3.

22. *See* Nawrocki, *Grenzverletzer "vernichten": Wie man DDR-Bürger am Verlassen ihres Staates hindert*, Die Zeit, Aug. 13, 1976, at A9, col. 1. A Berlin Wall necrology is provided by Finn, *Die Opfer der Mauer*, 14 DEUTSCHLAND ARCHIV 790-95 (1981).

23. STGB.DDR § 213 (1980). Serious cases (*schwere Fällen*) are defined as those which involve damage to border security equipment, the possession of tools with which to inflict such damage, the possession of weapons, the application of dangerous methods, the use of false documents, concealment, group action, recidivism, or special intensity (*besondere Intensität*) in the deed. Non-serious cases (which are obviously few) are punishable by imprisonment of up to two years, conviction with a suspended sentence, or a fine of up to 100,000 marks. Remarks upon the 1979 sharpening of these provisions may be found in Schroeder, *Die Neue Strafrechtsreform der DDR*, 12 DEUTSCHLAND ARCHIV 1064, 1072 (1979); Lammich, *Das politische Strafrecht in der DDR und den anderen sozialistischen Ländern*, 13 DEUTSCHLAND ARCHIV 843, 845-48 (1980); Palenberg, *Disquiet on the Western Front*, 5 FLETCHER FORUM 351-61 (1981).

24. STGB.DDR § 225 (1980).

25. STGB.DDR § 100 (1980). The sanctions for non-compliance with the *Anmeldepflicht* (duty to report) are imprisonment for up to five years, conviction with a suspended sentence, a fine of up to 100,000 marks, or public denunciation.

26. For thorough descriptions of the "modern frontier" fortifications, see D. SHEARS, *supra* note 7, at 70-87; N.Y. Times, Sept. 15, 1978, at 138; *id.*, July 20, 1980, at A3, col. 4; Chicago Tribune, Sept. 24, 1978, at A10, col. 1; L.A. Times, March 23, 1979, at A6, col. 3.

curity systems, 1,211 kilometers of double barbed wire barricades, 790 kilometers of vehicle traps, 96 kilometers policed by dogs, 625 observation towers, 34,800 automatic firing devices operated by trip wires and other triggers, and 366 kilometers of minefield containing as many as 1,000,000 mines.[27]

Supplementing these disheartening obstacles, East German border patrolmen are under order to shoot anyone who breaches border security.[28] Official West German estimates conservatively place the number of East Germans slain in escape attempts along the FRG-GDR border at 103, with an additional 70 fatalities registered on West Berlin's perimeter.[29] East German refugees in the FRG speculate that for each illicit border crossing that succeeds, eight or ten fail.[30] Even if unduly pessimistic, this estimate comports with reports that over half of the political prisoners in the GDR have been imprisoned on account of attempted *Republikflucht*.[31]

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27. L.A. Times, March 23, 1979, at A6, col. 3. A recent report described, in reverse order, some of the obstacles which a refugee must overcome in stealing across the FRG-GDR border:

> The 9-foot-high fence is a mesh of razor-sharp metal triangles, just big enough that a person can get his fingers in for a handhold. The fencing hangs loosely from cement posts sunk three feet into the ground and set five feet apart. It is not electrified. . . . Two antipersonnel mines are strapped on [the] east side of each post, one at hand level, one at knee level. They are aimed parallel to the fencing. They are armed with a quarter pound of TNT and a half pound of buckshot. It takes a quarter-ounce of pressure on the fence to set them off. If one facing south is tripped, then one facing north goes off, catching anything between in a crossfire. . . . East of the fencing are a few yards of cleared and plowed earth, raked smooth to show any footprints. A few yards behind is a 5-foot-wide vehicular ditch with concrete slabs. A few yards beyond is a concrete runway for East German border guards, their vehicles, and their dogs. . . . Beyond the runway is more plowed and raked earth, then open fields. Finally, 500 yards from the first fence is another fence . . . and it is said to be electrified. Every half-mile along the trace the East Germans have [concrete guardtowers] . . . .

Chicago Tribune, Sept. 24, 1978, at A10, col. 1.

28. Directives familiar to Western observers instruct East German patrols to issue a verbal warning before firing on border trespassers. Still secret directives, however, evidently order the patrols to disregard formalities if necessary to prevent an escape. *See* DDR HANDBUCH, *supra* note 9, at 922. For a somewhat dated account, see Grünwald, *Ist der Schusswaffengebrauch an der Zonengrenze strafbar?* 1966 JURISTENZEITUNG 638, 638-39. *See also* The Times (London), Jan. 22, 1981, at 14, col. 3 (fleeing woman reported slain).

29. DDR HANDBUCH, *supra* note 9, at 922.

30. N.Y. Times, Oct. 6, 1979, at A1, col. 3.

31. *Id.*, N.Y. Times, Dec. 30, 1977, at A3, col. 3; L.A. Times, Nov. 28, 1979, § VI, 1, col. 1; Raguse, *supra* note 3, at 588. *See also* Der Tagespiegel (W. Berlin), April 30, 1978, at 3, col. 1 (relating estimates that placed the GDR's pre-1979-amnesty political prisoner count at between 4,000 and 6,000). As many as 40,000 East Germans have been convicted of *Republikflucht* since the 1961 border closure, according to one West German source. Chicago

### *B. A Crack in the Wall*

Ironically one of the reputedly least perilous routes to the West to become known in recent years, leads would-be East German emigrants directly through the prison cells of the GDR. Since 1963, the West German Government has funneled over $500 million worth of prized Western merchandize and currency to the GDR in exchange for the release of over 16,400 political prisoners into the West.[32] Bringing approximately 1,200 persons routinely and safely across the border each year, the exchanges have reportedly inspired many East Germans to consider them as an avenue of escape.[33] One East German emigré described their scheme in this manner:

> If someone wants to get out these days, he may just begin speaking his mind. . . . That's good enough to get you in jail quickly. You're betting that the West Germans will buy you and you're not running the risk of being shot to death. It's a very brutal gamble, but I know that there are people now who have thought the situation over and are acting accordingly.[34]

Writing in *Orbis*, Norman Naimark detailed the attractions of voluntary incarceration:

> Word has spread quickly among dissatisfied circles of East German society that the former political internees are treated well by the West German government. Not only are they eligible immediately for government-supported housing and social and medical services, but, in contrast to the illegal refugee, they receive cash payments in the form of a *Haftentschädigung* ("compensation for false arrest"). According to the Constitution of the Federal Republic, West German law applies to East Germany; if East German citizens are imprisoned for breaking laws not on the books of the West German criminal code, they are eligible for the same compensation for false imprisonment that applies in the West. In addition, by being bought out of prison, the East

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Tribune, Jan. 14, 1978, at 8, col. 6. It should be noted that the GDR denies that it at present holds any political prisoners. Interview with Erich Honecker, Feb. 6, 1981, 14 DEUTSCHLAND ARCHIV 318, 325 (1981).

32. N.Y. Times, March 16, 1980, at A8, col. 1; Frankfurther Allgemeine Zeitung, Nov. 1, 1979, at 10, col. 2. The West German government reputedly budgeted around 84 million marks for the exchanges in 1978, 91 million in 1979, and 100 million marks in 1980. *Id.*

33. *See* M. MEYER, *supra* note 5, at 187; Chicago Tribune, Nov. 3, 1979, at A10, col. 6; N.Y. Times, Oct. 28, 1979, at L5, col. 1; GESICHT ZUR WAND: PROTOKOLLE POLITISCHE HÄFTLINGE DER DDR 21 (J. Lolland and F. Rödiger ed. 1977); Frankfurter Allgemeine Zeitung, Nov. 1, 1979, at 10, col. 2; Naimark, *supra* note 3, at 574; L.A. Times, Nov. 28, 1979, § VI, 1, col. 1; Raguse, *supra* note 3, at 588.

34. N.Y. Times, Oct. 28, 1979, at L5, col. 1.

> German "refuseniks" legally exit from the GDR. They can legally use the transit autobahns, theoretically can visit in the East (for those under age 65, this is still theory), and can hope for reunification with their GDR families in the West. On the other hand, illegal escapees are still criminals in the East, dare not use the transit autobahns, receive no lump-sum payments from the West, and — most difficult of all — arrive in the West with a debt (usually some 15,000-20,000 marks per head) to the organizations that arranged their escapes. Their families in the East are harassed more severely than those of the released political prisoners; they can maintain little hope of ever seeing their families again.[35]

Thus, for persons intent upon migration to the West, and especially for those with neither the means to hire professional refugee smugglers nor the cunning to plot their own sensible escapes, the route through the prisons may be the most reasonable choice. This choice is not, however, risk-free. In the absence of a Western friend to champion his cause, a political prisoner may be overlooked by the Bonn Government. The East Berlin Government may intentionally decline to offer him for trade.[36] The GDR's leadership may decide, as it did in 1979, to declare a general amnesty,[37] thereby turning the luckless political prisoner onto the streets with a police record, no egress to the West, and the prospect of a minimum sentence of three years if he commits another political

35. Naimark, *supra* note 3, at 574-75.

36. The method by which prisoners are selected for exchange is discussed *infra* accompanying notes 57-59.

37. General amnesties recur periodically in the GDR. *See* A BIS Z: EIN TASCHEN- UND NACHSCHLAGSBUCH ÜBER DEN ANDEREN TEIL DEUTSCHLANDS 24-25 (11th ed. 1969); DDR HANDBUCH, *supra* note 9, at 40. In the 1979 amnesty, 21,928 prisoners were released, and tens of thousands of prison sentences were significantly reduced. *See* Frankfurter Allgemeine Zeitung, Nov. 1, 1979, at 10, col. 2; *id.* Dec. 18, 1979, at 6, col. 5; Frankfurter Rundschau, Sept. 28, 1979, at 8; Fricke, *Bilanz der DDR-Amnestie '79*, 13 DEUTSCHLAND ARCHIV 127 (1980). Of the individuals released approximately 1,500 could be properly designated as "political prisoners," according to a West German group interested in refugee affairs. Fricke, *supra*, at 128. Unlike the general amnesty of 1972, which involved the immediate release to the West of over 2,087 of the 25,000 discharged prisoners, the 1979 amnesty permitted only four East German prisoners to cross the border. A report in the *Frankfurter Allgemeine Zeitung* observed that the GDR's decision to retain the freed prisoners was intended "to check the spreading opinion in the GDR that if one wants to go to the West, one only has to commit some criminal deed which will not be punished too harshly — *e.g.*, being caught while preparing to flee — and sit in prison for awhile in order ultimately to be shipped to the West. . . . Many people who flee and become subject to punishment in the GDR are speculating upon being bought free in the near future. Obviously such speculations are to be ended." Frankfurter Allgemeine Zeitung, Nov. 1, 1979, at 10, col. 2.

crime.[38] Finally, as briefly occured in 1972 and again in 1979, the exchanges could simply be broken off.[39]

Mutual advantage, however, gives both German governments good reason to continue the transactions. For the GDR, the exchange arrangement brings in badly needed Western goods at little immediate effort or expense,[40] relieves troublesome crowding in state prisons,[41] spares the national treasury the expense of incarcerating malcontents, flushes undesirable misfits out of the country, helps protect the GDR from harangues over the imprisonment of dissidents, provides a simple means of filtering spies into the West and pleases influential politicians in Bonn.

West German leaders view the arrangement with favor because, among other things, it sometimes delivers experienced German white and blue-collar workers at modest prices[42] and supplies a ready source of information on East German prison and social conditions. In addition, it enables West Germany to assure its agents that it will be able to fish them out of captivity if they are snared, and provides the Bonn Government with the satisfaction of both serving humanitarian ends and exercising its constitutionally assigned role as *Schutzpatron* of all Germans.[43]

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38. STGB.DDR § 44(2)(F) (1980).

39. N.Y. Times, Oct. 28, 1979, at L5, col. 1; *Frankfurter Allgemeine Zeitung*, Oct. 29, 1979, at 1, col. 1; L.A. Times, Nov. 28, 1979, § VI, 1, col. 1. In 1972, the exchanges were temporarily halted by West Germany for reasons associated with its national elections of that year. M. MEYER, *supra* note 5, at 197 n.2. The *New York Times* reported that exchanges were also interrupted by Bonn in 1966 because of the "danger that the Communists might attempt to arrest Westerners deliberately in hopes of obtaining payment for their release." N.Y. Times, Feb. 1, 1966, at A4, col. 4.

40. *See* Naimark, *supra* note 3, at 558; Croan, *supra* note 19, at 155-58.

41. Raguse, *supra* note 3, at 587, speculates that the GDR's general amnesties are necessary to relieve over-crowding in East German prisons. To the extent that people place themselves in prison in the hope of being purchased out, this particular advantage is erased. *See also* Der Tagesspiegel (W. Berlin), April 30, 1978, at 3, col. 1.

42. The prices are reasonable in that the benefits which an experienced worker is likely to confer upon West German society over the course of his career will probably far outweigh the costs of bringing him out of the GDR and reorientating him. The persons purchased out tend to be young and able. Of the three hundred prisoners released into the FRG between October 1976 and December 1976, for example, roughly 167 (55.7%) were from 18 through 27 years old, 99 (33.0%) from 28 through 37, with the remaining 34 (11.3%) over 38. Arranged by profession, there were 202 laborers and craftsmen (67.3%), 49 academicians (16.3%), 22 white collar workers (7.3%), 15 students (5.0%), 6 agrarian workers (2.0%), 4 artists (1.3%), 1 independent entrepreneur (0.3%), and 1 pensioner (0.3%). [Percentages rounded off to the nearest tenth of a per cent.] GESICHT ZUR WAND, *supra* note 33, at 23-24. *See also* N.Y. Times, Oct. 6, 1975, at A1, col. 1 (release of physicians reported).

43. In its Judgment of July 31, 1973, the West German Federal Constitutional Court, in ruling on the constitutionality of the Basic Treaty of 1972 between the FRG and the GDR, proclaimed:

Despite the advantages which the exchanges yield both East Berlin and Bonn, neither government, for understandable reasons, has been happy to see them publicized.[44] From the GDR's perspective, the practice of routinely surrendering wayward citizens into the hands of "fascist monopoly capitalists" is difficult to reconcile with conventional Marxist rhetoric and ideology, even if fresh produce and consumer wares are received in return. The theoretical inconsistencies inherent in the trade manifest themselves in practical problems. East German security forces, for instance, probably would not be inspired to greater zeal in their duties by the recognition that the severe penalties meted out for crimes against the state are within months commonly converted into one-way tickets to West Germany; a place envisioned by many as a "chrome-plated neon-lighted Shangri-La."[45] From the FRG's perspective, the reasons for secrecy are today not as compelling as they were formerly,[46] but the vulnerability of politicians of all three major parties to attacks from the right for subsidizing the GDR's methods of political repression and subversion with funds drawn from West German taxpayers, and the continuing sensitivity of the FRG's East German trading partners to criticism of the deals, have not encouraged governmental indiscretion.

Heedless of official desires, sharp condemnations of the prisoner exchange arrangements have intermittently appeared in the Western press, especially in conservative and Communist publications.[47] Peppered with references to international compacts, invo-

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> [W]ithin the Basic Law's realm of effect, [the Federal Government] — through all its diplomatic missions and in all the international fora in which it is a participant — is to raise its voice, to make its influence felt, to step in for the interest of the [German] nation, for the protection of Germans in the sense of Article 116, Paragraph 1 of the Basic Law. . . even for every individual [German] who turns with a plea for meaningful support in the defense of his rights, particularly his constitutional rights. [Translation by this author.]

Judgment of July 31, 1973 — 2 BvF 1/73 — (BVerfGE 36, 1), *quoted in* Heimeshoff, *Die Schutzpflicht der Bundesrepublik gegenüber Fluchthelfern*, 1975 DEUTSCHE RICHTERZEITUNG 111, 112. *See also* 22 RECHT IN OST UND WEST 279-80 (1978).

44. *See supra* note 3.

45. The colorful metaphor is from J. DORNBERG, *supra* note 7, at 122.

46. As a condition of exchange, the GDR demanded absolute secrecy of the FRG. *See infra* notes 3 & 51.

47. *See, e.g.*, Rheinischer Merkur (Bonn-Bad Godesburg), Mar. 9, 1979, at 2, col. 2; Bayernkurier (Munich), Aug. 12, 1978, at 3; Bianco y Negro (Madrid), May 8, 1979; La Republica (San José, Costa Rica), Oct. 9, 1975, at E5, col. 1. *But see* M. MEYER, *supra* note 5, *passim* (supporting the exchanges on humanitarian grounds); Pond, *Trade in Humans Divulged*, Christian Science Monitor, April 26, 1978, at 6, col. 4 (denying exchanges are mod-

cations of international law, and frequently, legal terminology, these condemnations commonly chastize the GDR for engaging in slavery,[48] kidnapping for ransom,[49] or gross violations of human dignity (e.g., "brokerage in human flesh").[50] The GDR responded to these allegations in 1979 by declaring an end to the arrangements.[51] Although the East Germans offered no explanation for their unilateral decision, one Western observer noted:

> Decisive [to the announced termination] . . . is concern over the international reputation of the GDR. The East Berlin regime perceives that world-wide the finger of accusation is pointed at it: You traffic in men for filthy mammon.[52]

In March 1980, the GDR, without explanation or ceremony, resumed its exchanges with the FRG.[53] The most highly publicized transaction since then involved the delivery of approximately 3,000 East German nationals to West Germany in exchange for an undisclosed payment, as well as a spy swap featuring Guenther Guillaume, the former assistant to ex-West German Chancellor Willy

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ern white slave trade). *See also* Weltwoche (Zurich), March 15, 1978, at 23. *See generally* N.Y. Times, Oct. 28, 1979, at L5, col. 1; Frankfurter Allgemeine Zeitung, Jan. 10, 1979, at 4, col. 1.

48. *See, e.g.*, Frankfurter Allgemeine Zeitung, Jan. 10, 1979, at 4, col. 1 (condemnation of the deals as "modern slave trade" by Erich Mende, former West German Minister of Intra-German Affairs and a co-originator of them); L.A. Times, Nov. 28, 1979, at § VI, 1, col. 1 (quoting a British spokesman at the U.N. Human Rights Commission who criticized the GDR for "carrying out a 20th century slave trade"). *See also* M. KRIELE, DIE MENSCHENRECHTE ZWISCHEN OST UND WEST 33 (1977); M. MEYER, *supra* note 5, at 214; Washington Post, May 19, 1978, at C1, col. 2.

49. *E.g.*, La Republica (San Jose, Costa Rica), Oct. 9, 1975, at E5, col. 1:

> All civilized peoples conemn kidnapping not because of the sums that have to be paid to ransom an individual, but because the human being regardless of the price is transformed into a piece of merchandise. . . . The East German government's immorality has reached such a point that it has included these sales [of persons kidnapped by the communist regime] in trade agreements. . . . It appears that cynicism has become the greatest norm of international law.

50. *See* Whitney, *supra* note 3, at 46, col. 1.

51. N.Y. Times, Oct. 28, 1979, at L5, col. 1; Frankfurter Allgemeine Zeitung, Oct. 29, 1979, at A1, col. 1; Washington Post, May 19, 1978, at C1, col. 2. Wolfgang Vogel (*see infra* note 56) had warned in 1978, "[The exchanges] could come to an end if the German Democratic Republic has the feeling that the exchange is being taken advantage of and exploited by Western propaganda against the East." *Quoted in id.* In an interview with the West Berlin newspaper *Der Abend*, Vogel reportedly said, "I see very black clouds on the horizon since it has become fashionable to reduce true help to material for the market in scandals and gossip." *Quoted in* Frankfurter Allgemeine Zeitung, Nov. 1, 1979, at A10, col. 2. *See also* M. MEYER, *supra* note 5, at 219; Whitney, *supra* note 3, at 54.

52. Engert, *DDR stoppt den Freikauf*, Deutsche Zeitung, Oct. 26, 1979, *quoted in* Fricke, *supra* note 37, at 129.

53. N.Y. Times, March 16, 1980, at A8, col. 1.

Brandt.[54] Before moving on to consider whether the intra-German exchange arrangements constitute a violation of international law, a few additional remarks on their history and method of operation are appropriate.

### *C. Anomaly Wrapped In Enigma*

The sensational exchange of Soviet master spy Col. Rudolf Abel for downed American U-2 pilot Francis Gary Power in February 1962, inspired hopes among some Western politicians that something could also be done to bring relief to the thousands of political internees sitting in Communist prisons. At Western request, Jürgen Stange, a West Berlin lawyer, approached Wolfgang Vogel, a well-connected East Berlin lawyer who had represented Col. Abel in his exchange negotiations, and began to sound out possibilities. In late 1962, through the good offices of West Berlin publisher Axel Springer, Stange and Vogel presented the Bonn Government with a remarkable proposal: at a standard charge of 40,000 West German marks per person, the East German Government was willing to begin a large-scale secret release of political prisoners. Skeptical at first, the West Germans delayed acceptance of the offer until after a trial exchange had been successfully completed in 1963.[55] Once the good faith and ability of Stange, Vogel, and their East German contacts was established, the transactions in 1964 assumed the form and scale that they in many respects still exhibit today.[56]

The method by which prisoners are selected for release is relatively simple: two lists — one drawn up in Bonn from names suggested by churches, charitable organizations, government offices,

54. Boston Globe, Oct. 3, 1981, at 3, col. 5; Deutschland Nachrichten (New York), Oct. 7, 1981, at 4.

55. On the platform of the Friedrichstrasse, an elevated railway station in East Berlin, eight political prisoners filed one-by-one into the West as a representative of the Evangelical Church of Germany (an organization accustomed to moving money into East Germany along covert channels) slipped eight bundles, containing a total of 360,000 West German marks, to an East German customs agent. Whitney, *supra* note 3, at 50. For an equally intriguing, but in many particulars divergent, account of the 1963 exchange, see M. MEYER, *supra* note 5, at 34-40.

56. Whitney, *supra* note 3, at 52. For descriptions of the intriguing Dr. Vogel, see *Der Spiegel*, Sept. 1, 1975, at 28-29; *id.*, Oct. 27, 1975; N.Y. Times, May 6, 1978, at C7; Whitney, *supra* note 3, at 46-56; Frankfurter Allgemeine Zeitung, Nov. 12, 1976, at A12; Kölner Stadt-Anzeiger, July 29, 1977, at A3; Rheinischer Merkur (Bonn-Bad Godesburg), Oct. 31, 1975, at A10.

and private individuals;[57] the other list prepared by East German officials authorized to designate prisoners suited for release — are compared by Stange and Vogel. The persons whose names appear on both lists are then divided into categories and priced according to how much damage their departure will inflict upon the GDR. Thus doctors, whose training expenses absorb a sizable chunk of state resources, command the highest price (up to $75,000), while a common laborer may go for as little as $15,000.[58] Since both Stange and Vogel enjoy the confidence of their respective governments, their determinations are reportedly never challenged.[59]

Because for many years the FRG refused to recognize the existence, let alone the legitimacy of the GDR, and because the GDR insisted upon total secrecy in its prisoner dealings, the transfer of assets from the FRG to the GDR initially presented problems. Bonn steered around these problems by, first, budgeting its transfer expenditures under vaguely entitled accounts (much as the budget of the United States' Central Intelligence Agency is prepared);[60] second, contributing its payments in the form of agricultural products and industrial goods to churches, the Red Cross, and other non-profit institutions; and third, permitting the charitable middlemen to ship the payments into the GDR.[61] In this way, the

57. The German Red Cross, the Roman Catholic Church, and the Evangelical Church of Germany have been active in supplying names. The Bonn Government has on occasion solicited names in discrete classified advertisements.

58. *See* Wash. Post, May 19, 1978, at C1, col. 2; Frankfurter Allgemeine Zeitung, Nov. 1, 1979, at A10, col. 2. The price gradations are theoretially peculiar. It is odd, for instance, that in a "workers' and peasants' state," the members of the ruling group are assigned the lowest value in exchange.

59. M. MEYER, *supra* note 5, at 49.

60. M. MEYER, *supra* note 5, at 160, cites as examples the rubrics "Training and Education" and "Measures in Connection with Intra-German Relations and the Border Areas." The title "Special Humanitarian Efforts" is currently used frequently.

61. *See* N.Y. Times, Oct. 6, 1975, at A1, col. 1; *id.*, Dec. 4, 1976, Whitney, *supra* note 3, at 46, 52; M. MEYER, *supra* note 5, at 159-67. *But cf.* Washington Post, May 18, 1976, at C1, col. 2 (claiming only a minority of the payments have been made with barter); L.A. Times, Nov. 28, 1979, § VI, at 1, col. 1 (stating the GDR receives trade credits for use with West German industrialists). *New York Times* correspondent Craig R. Whitney described a typical circle of transactions in these words:

> In September 1975, the word from Vogel was that the East German authorities were willing to release 300 prisoners, their last batch for the year. But the usual rate . . . would not suffice, since the group contained many doctors it had cost the Government $60,000 a head to train. [West German Minister for Intra-German Affairs] Franke approved a higher figure and sent a check to Bishop Kunst [of the Evangelical Church of Germany]. That elderly clergyman sent a subordinate to the Ministry of Trade in East Berlin for the Communists' shopping list. Bishop Kunst paid the bills, the prisoners turned up at the crossing point at Herleshausen, and the food items on the list turned up shortly in the East Berlin markets off the Alexanderplatz.

East Germans received products for which they would otherwise have had to purchase with scarce foreign exchange or forego, and the West Germans could be sure that their payments were at least going to benefit the East German people.[62] Butter, citrus fruits, coffee beans, chemicals, Swedish steel, and boxcars full of other Western products mysteriously appeared in East German markets coincident with each prisoner release. Michel Meyer, the French journalist whose book brought the exchanges to widespread attention, went so far as to suggest:

> . . . [S]ince the beginning of the 1960s, only thanks to the sale of many thousands of prisoners could oranges be sold in the shops of the GDR.[63]

Although the reticence of both Bonn and East Berlin renders most estimates of the value of the prisoner exchanges somewhat suspect,[64] the figures usually offered by fairly reliable sources make one United States intelligence officer's characterization of the prisoners as "East Germany's best cash crop" seem only modestly overstated. As Meyer pointed out, any sum near the 761 million mark total which he believed had been paid East Germany from 1964 through 1975 would have played a significant part in offsetting the GDR's 3,749 million mark intra-German trade deficit over the same period.[65]

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Whitney, *supra* note 3, at 52.

62. Erich Mende explained:

> By the national elections of 1965 we had gotten 4,000 political prisoners out, for 198 million marks' worth of goods — everything from fertilizer, drugs, coffee, radios to tropical fruit. It was done through church channels and we made sure the people in East Germany benefited from it. After one of the deals had been made, we'd send some one to the East Berlin food markets to check on whether, say, a shipment of oranges had arrived. . . . [We chose barter because] [w]ith cash you wouldn't be able to tell what happened to the money.

*Quoted in* Whitney, *supra* note 3, at 52 [Whitney's comments deleted.]

63. M. MEYER, *supra* note 5, at 199. Similar but less sweeping statements are in *Der Spiegel*, Sept. 1, 1975, at 28; Whitney, *supra* note 3, at 46.

64. Werner Raguse reported that the following patchwork of estimates had appeared in Western newspapers over a three year period:

> at least 265 million marks in the time from 1969 through August 31, 1974 (Quick, Jan. 23, 1975), 264 million from 1969 to 1975 (Paris Match, Aug. 16, 1975), 748 million from 1963 to 1975 (German Press Agency, Sept. 14, 1975), approximately 265 million from 1969 to 1975 (Welt, Oct. 20, 1976), 800 million from 1963 to 1976 (AFP, June 24, 1977), 720 million from 1962 to 1976 (Welt, Sept. 20, 1977), 500 million from 1963 to 1977 (Ehrich Mende, Oct. 9, 1977).

Raguse, *supra* note 3, at 590.

65. Wash. Post, May 19, 1978, at C1, col. 2 (quoting the intelligence officer); M. MEYER, *supra* note 5, at 193-99 (gauging the economic effects of the trade). One scholar suggested that the economic benefits which the GDR began to enjoy from the traffic in 1964 prompted

Despite the curtain of secrecy behind which the two Governments have sought to hide their dealings, the outlines of the intra-German traffic in political prisoners are today clearly visible. For almost eighteen years, the GDR and FRG, operating through private parties, have engaged in a systematic trade in human beings. Although neither Stange nor Vogel has been designated an official representative by their governments, both lawyers enjoy a broad range of powers to arrange the affairs of their respective states. Both men exercise a quasi-governmental function in their regulation of international penal affairs, and at least Vogel speaks freely of the "mandate" which they possess to carry out their missions.[66] By covertly authorizing Stange and Vogel to exchange governmentally composed "inventory lists" of wants and supplies, to establish prices, and to transport "cargoes" of prisoners to designated delivery points, the two German governments have treated the GDR's political prisoners much like any other common article of commerce. On this description of the arrangements will the following legal analysis lie.

## II. VIOLATIONS OF INTERNATIONAL LAW

### *A. Slavery*

Does the intra-German trade in political prisoners represent a modern form of slave trade, violative of international law?

Superficially, at least, several facets of the intra-German trade in prisoners invite quick comparison to established aspects of the international slave trade. Both institutions center upon the international movement of money or goods in exchange for control over persons: (1) who are in captivity (2) in asserted violation of their human rights and (3) who are allegedly compelled to perform manual labor.[67] Furthermore, while one might try to distinguish the two trades on the basis that the FRG lays no claim to the liberty of the persons whose release it purchases, the analogy may be preserved by portraying the FRG as the modern-day equivalent of a nineteenth-century philanthropist engaging in the purchase of

officials to define a 1964 general amnesty in a way which kept political prisoners behind bars and ready for market. K. FRICKE, POLITK UND JUSTIZ IN DER DDR 490 (1979).

66. *See* M. MEYER, *supra* note 5, at 49 (describing the unofficial nature of Stange and Vogel's commission); *id.*, at 218 (Vogel describing his mandate).

67. Although East German citizens are under an obligation to contribute their energies to the development of socialist society, the compulsion referred to here is that of forced labor within the GDR's penal institutions. *See* GESICHT ZUR WAND, *supra* note 33. Argument over the legality of "correctional labor" is beyond the scope of this article.

slaves for the purpose of granting them their freedom. By paying the offeror's price, the philanthropist and FRG alike forward the progress and the profit of the trade, making possible its very existence.

Intriguing though it may be, the analogy is obviously somewhat strained (note, for instance, the ambiguity of the phrase "in captivity"), and collapses completely when held up against the authoritative and binding definitions of slavery and slave trade that are incorporated in the international anti-slavery conventions to which both German states are parties. These conventions fall into two distinct categories: (1) conventions directed against the "white slave trade;"[68] and, (2) a pair of major conventions prohibiting chattel slavery and analogous institutions. Since the former category, relating to the enticement or entrapment of women into prostitution for the profit of others, is without direct relevance to this Article, the latter category of conventions will be the focus of inquiry in the discussion that follows.

The Slavery Convention of 1926, as amended,[69] binds both the GDR and the FRG (a) "[t]o prevent and suppress the slave trade; [and] (b) [t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."[70] Similarly, Article 3(1) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,[71] which also binds both states, proclaims: "[t]he act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offense under the laws of the States Parties to this Convention. . . ." In its preamble, the 1956 Supplementary Convention made special reference to the 1948 Universal Declara-

68. For a list of and citations to the conventions against the white slave trade to which the FRG and GDR have subscribed, *see* MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS FUNCTIONS — LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC. AS OF 31 DECEMBER 1979, at 213-235 (1980). This source may be used to verify the dates of accession given after treaty citations in the notes below.

69. Slavery Convention, *opened for signature* Sept. 25, 1926, *and amended by the* Protocol, *opened for signature* Dec. 7, 1953, 212 U.N.T.S. 17. Acceded to by the GDR on July 16, 1974; acceded to by the FRG on May 19, 1973.

70. *Id.*, Art. 2.

71. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, 266 U.N.T.S. 3. Acceded to by the GDR on July 16, 1974; ratified by the FRG on Jan. 17, 1959.

tion of Human Rights,[72] which in its Article 4 announces: "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." Finally, the International Covenant on Civil and Political Rights,[73] an instrument ratified by the GDR and FRG, in Article 8 commands:

1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.
2. No one shall be held in servitude.

The obligation of both East Berlin and Bonn to eschew "slavery and the slave trade" assumes a critical importance. Incontrovertably established is the question of whether the definitions of those terms under international law embrace the intra-German trade in prisoners.

One of the "lasting achievements" of the 1926 Slavery Convention was the formulation of legal definitions of its subjects.[74] Article 1 of the Convention declared:

(I) Slavery is the status or condition of a person over whom any or all of the powers attaching to the *right of ownership* are exercised.

(II) The slave trade includes all acts involved in the capture, acquisition, or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a *slave* acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves. [Italics added]

In 1956, the Supplementary Convention was produced to cover certain practices believed to have been missed by the 1926 document. Explicitly endorsing the 1926 definition of "slavery," the 1956 Convention supplemented it by enumerating and banning several "institutions and practices similar to slavery," namely debt bondage, serfdom, marriages imposed by parental fiat on unwilling women, the transfer or inheritance of wives and the sham adoption of children with a view to exploiting them or their labor.[75] With

72. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/811, at 71 (1948).

73. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2000A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

74. *See* Nanda and Bassiouni, *Slavery, Genocide, and Racial Discrimination*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 503, at 509 (V. Nanda and M. Bassiouni eds. 1973).

75. Supplementary Convention, *supra* note 71, art. 1.

regard to "the slave trade" the 1956 Convention made several slight and one highly relevant modification in the 1921 definition:

> 'Slave trade' means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by exchange of a *person* acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance. [Italics added][76]

Clearly at the core of the definitions offered in the 1926 and 1956 Conventions is the figure of the slave — a person over whom the rights of ownership are asserted, much as they might be over conventional chattels or real property. The unmistakable target of both Conventions, judging from their antecedents,[77] titles, legislative history, and subsequent usage,[78] is the age-old institution of chattel slavery.[79] Since neither the GDR nor the FRG assert rights of ownership over the GDR's prisoners, and since the anti-slavery Conventions require (with only few exceptions) the involvement of a slave in a transaction before their provisions will operate to prohibit it, the 1926 and 1956 Conventions do not appear to condemn the intra-German trade in prisoners.

While the analogs to slavery and the slave trade enumerated

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76. *Id.*, art. 7, para. (c).

77. For brief accounts of the concerted international effort to extirpate slavery and the slave trade, see Nanda and Bassiouni, *supra* note 74, at 506-22; A. VERDROSS & B. SIMMA, UNIVERSALLE VÖLKERRECHT 612-13 (1976); U.N. ECOSOC, Ad Hoc Committee on Slavery, The Suppression of Slavery (Memorandum Submitted by the Secretary General), U.N. Doc. St/SOA/4 (1951); K. GLASER & S. POSSONY, VICTIMS OF POLITICS 454-56 (1979).

78. *See, e.g.*, M. AWAD, REPORT ON SLAVERY, U.N. Doc. E/4168/Rev. 1 (1966). This special report, designed to measure the degree of success which the anti-slavery conventions had achieved, included a battery of questions concerning slavery and the slave trade. The questions dwelt on matters involving "slaves" and "persons of servile status." No category of persons in circumstances even faintly resembling those of the GDR's traded prisoners was mentioned. *See also* K. GLASER & S. POSSONY, *supra* note 76, at 454-63. The GDR has proclaimed itself free of any violations of the anti-slavery conventions. The Reply of the Government of the German Democratic Republic Concerning the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, May 19, 1980, U.N. Doc. E/CN.4/Sub.2/AC.2/32/Add.1, at 7 (1980); The Reply of the Government of the German Democratic Republic Concerning the Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, May 19, 1980, E/Cn.4/Sub.2/Ac.2/33/Add.1, at 7 (1980).

79. For accounts of familiar forms of slavery, see C. RICE, THE RISE AND FALL OF BLACK SLAVERY (1975) (richly annotated); E. GÖRLICH, HERRENRECHT UND SKLAVENPEITSCHE (1971). Note, however, that *apartheid* has been attacked as a slavery-like practice.

and outlawed in the 1956 Convention protect persons other than the victims of traditional chattel slavery, they are few in number, limited in range and manifestly inapplicable to the intra-German transactions.[80] Therefore, critics of the transactions are left with one final straw at which to grasp. The substitution of the word "person" for "slave" in one clause of Article 7, of the 1956 Convention — so that it now defines "all acts of disposal by exchange of a person acquired with a view to being sold or exchanged" as forbidden slave trade — might permit a legal assault on the GDR for its role in the prisoner trade.

It could be argued that the change made in the 1956 document must be presumed to have meaning, that the plain meaning of "person" embraces all human beings, and that the GDR, in acceding to the Supplementary Convention without reservation concerning this clause, bound itself to abide by the treaty language. Such an assault, however, would probably fail for several reasons. First, the GDR's defenders could convincingly contend that the state "acquires" its prisoners with a view to preserving public order, and is then only coincidentally able to ameliorate their sentences by passing them into the West. Second, they could argue that the term "persons" in Article 7, refers only to those individuals otherwise affected by the Supplementary Convention (*i.e.*, chattel slaves, bartered wives, serfs, etc.). This argument is bolstered by the appearance in Section II (entitled "The Slave Trade") of nothing but references to the trade in *slaves*. Third, they could point out that the first line of Article 7 limits its definitions to "the purposes of the present convention," and that the only flat prohibition of "the slave trade" *per se* is in the 1926 Convention, where the disputed definition still reads "slave," not person. Fourth, relying upon common

80. As summarized by the Anti-Slavery Society, the four practices identified and prohibited by the Supplementary Convention are:

> DEBT BONDAGE is the state arising from a pledge by a debtor of his own personal services or of those of a person under his control as security for a debt, when the length and nature of the services is not defined nor does their value diminish the debt.
> SERFDOM is the condition of a tenant who must live and labour on the land of another person, whether for reward or not, and who is not free to change his status.
> EXPLOITATION OF CHILDREN—any practice whereby a person under 18 years old is delivered by parent or guardian to another person, whether for reward or not, with a view to exploiting him or his labour.
> SERVILE FORMS OF MARRIAGE—any institution whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind, or may be transferred to another person or, on the death of her husband, may be inherited by another person.

*Quoted in* K. GLASER & S. POSSONY, *supra* note 77, at 454.

sense and intuition, they could argue that the term "slave trade" naturally connotes the trade in *slaves*. Fifth, taking a positivist stance, the GDR's champions could insist that the post-1963 accession of the GDR to the Supplementary Convention evidences that: (a) the GDR did not consider the common interpretation among states of the clause to reach so far as to prohibit its arrangements with West Germany; and, (b) even if other states did so believe, the GDR did not intend to be bound in such a fashion, as its subsequent behavior demonstrated. Sixth, the practice of states has not been to invoke the Supplementary Convention in instances where one state has seized individuals in the hope of extorting concessions (e.g., the return of a deposed ruler, like the Shah of Iran) from another. Additional support for this point comes from the silence with which other states have met reports of the intra-German deals. While none of the foregoing arguments are irrebuttable, they in tandem make a plausible case, which may be all that is needed by the GDR to defend its position.

The anti-slavery Conventions do not appear to proscribe the intra-German deals, and in the absence of conventions, even so repugnant an institution as slavery might be legal under international law.[81] This study turns now to other bodies of international legal doctrine for possible proscriptions.

### *B. State Hostage-Taking/State Kidnapping/Ransom*

Is the intra-German trade in East and West German citizens who are confined in the GDR's prisons for political crimes a form of state hostage-taking prohibited by international law?

Since at least the time of the Babylonian Empire, the law has concerned itself with the seizure of individuals by sovereigns who seek to wrest property from parties beyond their grasp. An entire section of the Code of Hammurabi, the oldest known codification of law, was devoted to the limitation of the state's duty to ransom its subjects from foreign captivity.[82] Because ransom agreements tend to expose the reach and the limits of both the captor's and the

81. *See, e.g.*, J. BRIERLY, THE LAW OF NATIONS 240 (5th ed. 1955) ("Apart from convention, slave-trading is not illegal by international law."); L. OPPENHEIM, 1 INTERNATIONAL LAW 733 (8th ed. H. Lauterpacht 1955) (Observing that it is difficult to say customary international law prohibits slavery).

82. § 32 Code of Hammurabi (about 2250 B.C.), *translated and reprinted in* R. HARPER, THE CODE OF HAMMURABI KING OF BABYLON 21-23 (1904).

ransomer's power, and because word of a fat ransom can spur inactive hostage-takers to pursue either the flush captor or the pliant ransomer, the historical record of the precise terms of ransom deals is often scanty.[83] Nonetheless, the source materials are sufficient to reveal a persistent pattern of state hostage-taking and ransom-making from ancient times through today.[84] Historically, the parties who have stepped forward to purchase the freedom of captives have been the captive himself, his family, his guild, a chilvalric order, his home city, his vassal, his church, or his state.[85]

Viewed in a harsh light, the intra-German exchanges consist of the GDR, a State actor, seizing East and West German citizens under color of East German law[86] and then selectively ransoming them at variable prices to the West German Government.[87] If this formulation passes the test of legality under international law, then other descriptions more favorable to the GDR's cause will also escape condemnation.

A cluster of international legal instruments touch upon the topic of hostage-taking and ransoming. Some of them focus upon the regulation of state action against state hostages, while others are directed against various forms of private hostage-taking. All but one have little or no bearing on the intra-German prisoner exchanges. The first class of conventions pertains to the regulation of state hostage-taking in times of war.[88] Although a comprehensive

83. A. ERLER, DER LOSKAUF GEFANGENER 17-18, 58 (1978).

84. *Id.*, 7-74. During the medieval era, for instance, many of the most celebrated personages were at some point hostages for ransom. Among them were Frederick the Fair of Austria (1325), Richard the Lion-Hearted of England (1194), Joan of Arc (1430), and the French monarchs John II (1360), Louis IX [St. Louis] (ca. 1250), and Francis I (1526). *Id.*, 20, 42-44. In medieval Spain, the capture and ransom of hostages was so routine that a public office of ransom-broker [*Alfaqueque*] was instituted. *Id.*, 104-08. For modern instances of ransom hostage-taking, see *infra* notes 99-112 and accompanying text.

85. *Id.*, 18-41.

86. The GDR also maintains that it has an obligation under international law to confine persons threatening the GDR's border security and, *ipso facto*, international peace. Fricke, *supra* note 37, at 128.

87. Citizens of non-German states are sometimes prematurely released from East German jails as a result of special inter-governmental arrangements. Only intra-German cases fall within the scope of this Article.

88. *See, e.g.*, Hague Convention Respecting the Laws and Customs of War on Land, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, U.S.T. 539, 1 Bevans 631; Geneva Convention for the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature*, Aug. 12, 1949, 75 U.N.T.S. 135. Relevant extracts and other pertinent documents are reprinted in K. LANGENSTEIN, DIE ENTWICKLUNG DES GEISELRECHTS IN NEURER ZEIT A1-G21 (1970). For a discussion of the pre-1945 rules governing wartime

peace treaty to resolve World War II in the European theatre has still not been signed, a war of the kind necessary to invoke the martial conventions does not currently rage in Germany. The second class is variegated, and embraces the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,[89] the 1971 Montreal Convention for the Suppression of Unlawful Acts Against Civil Aviation,[90] and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.[91] Keyed to the prevention of highly specific forms of hostage-taking, conventions of this second class have not been directed toward practices like those of the GDR-FRG arrangements. Of great interest, however, is the 1979 International Convention Against the Taking of Hostages,[92] to which the FRG, but *not* the GDR, is a signatory.[93]

The as-of-yet unratified 1979 Convention does not deal specifically with hostage taking performed by a state. Yet, several of its clauses are of direct relevance to the intra-German trade. The Preamble of the Convention unequivocally proclaims:

> . . . [T]he taking of hostages is an offence of *grave concern to the international community* and . . . in accordance with . . . this convention, *any* person committing an act of hostage taking shall be either prosecuted or extradited. [Emphasis added]

Article 1 of the Convention defines the prohibited action in this manner:

> 1. *Any person* who *seizes* or detains and threatens to kill, to injure or to continue to detain *another person . . . in order to*

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hostage-taking, see G. VOLLMER, ENTWICKELUNG UND HEUTIGE BEDEUTUNG DER GEISELSCHAFT 55-68 (1926).

89. Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

90. Convention to Discourage Acts of Violence Against Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

91. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.N. GAOR Supp. (No. 30) 147, U.N. Doc. A/9030 (1973), *reprinted in* 13 I.L.M. 41 (1974).

92. International Convention Against the Taking of Hostages, *opened for signature* Dec. 18, 1979, 34 U.N. GAOR, Supp. (No. 46) 245, U.N. Doc. A/RES/34/146 (1980), *reprinted in* 40 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 304-11 (1980) *and in*, 18 I.L.M. 1457 (1979). *See* Platz, *Internationale Konvention gegen Geiselnahme, id.*, at 276-311. *See generally* Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 DEN. J. INT'L L. & POL'Y 169-95 (1980).

93. The FRG signed the Convention on Dec. 19, 1979.

> *compel a third party*, namely, a *State*, an international intergovernmental organization, a natural or juridical person, or a group of persons, to *do* or abstain from doing *any act* as an *explicit or implicit condition* for the release of the hostage *commits the offence of taking of hostages*. . . .
>
> 2. *Any person* who:
>
> . . .
>
> (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence. . . . [Emphasis added.]

Article 3 of the Convention requires:

> 1. The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure. . . .

Klaus Wilhelm Platz, Reporting Legation Counsel of the West German Foreign Ministry (which spearheaded the drive for the Convention), illuminated the scope of Article 1 in these terms:

> The definition [in Article 1] . . . is abstract and politically neutral. Thus, any person can be an offender, that is, not only a private person, but also, for example, a state functionary operating in his official capacity, regardless of his rank. . . . This is true for the instigation of or participation in [a hostage taking] . . . as well. . . . [T]he motive and the peculiar political circumstances of a hostage taking, in terms of the definition in Art. 1 of the Convention, is also irrelevant.[94]

Does this mean that the GDR should shun the opportunity to sign the Convention? Not necessarily, for the GDR has ready two impressive defenses against attacks based upon the wording of the Convention for its part in the exchange deals. First, Article 13 of the Convention, incorporated into the document at Soviet insistance, provides:

> This Convention shall not apply where the offence is committed within a single state, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.

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94. Platz, *supra* note 92, at 286-87. [Translation by the author.] *See also* Note, *The United Nations Effort to Draft a Convention on the Taking of Hostages*, 27 AM. U. L. REV. 431-81 (1978); Report of the *Ad Hoc* Committee on the Drafting on an International Convention Against the Taking of Hostages, 32 U.N. GAOR, Supp. (No. 39) 36, U.N. Doc. A/32/39 (1977) (statement by the Syrian delegate that the Convention should reach state hostage-taking); *id.*, at 63-64 (statements by the FRG and Mexico that persons acting as state agents would fall within the scope of the Convention).

Through this loophole slips the GDR's trade of East Germans to the West in entirety. Second, Article 1, paragraph 1, defines a hostage-taking in terms of the hostage-taker's *intent*. The GDR could easily and persuasively maintain that it seizes *none* of its political prisoners, East German or otherwise, "in order to compel" a third party to deliver up some concession. The obvious argument would again be that the GDR imprisons "enemies of the State" for security reasons, and then only fortuitously is able to do the prisoners, the FRG, and itself a favor by trading them to the West.

Thus, in terms of the codified international law on hostage-taking, the intra-German prisoner exchanges again pass muster. A consideration of the applicability of the general rules of international law, as evidenced by the practice of states, the rulings of international tribunals, and the opinions of publicists, to the intra-German exchanges is next in order.

### *C. General Principles Of International Law*

From the perspective of both the GDR and the international community,[95] the individuals traded in the intra-German exchanges fall into two categories: citizens of the GDR (domestic) and citizens of the FRG (foreign). Traditionally, the general rules of international law have shielded nationals of one State from certain forms of mistreatment at the hands of the prosecutorial and penal officials of another State (e.g., inhumane prison conditions, flagrant disregard of rudimentary principles of fairness, etc).[96] The obligations imposed by these rules notwithstanding, and absent a

95. The Bonn Government persists in refusing to recognize a separate GDR nationality. *See* 22 RECHT IN OST UND WEST 279-80 (1978). The GDR insists that separate East German and West German citizenships exist, and accuses the FRG of interfering with the sovereignty of the GDR in maintaining the contrary position. Riege, *Die Staatsangehörigkeitsdoktrin der BRD — Interpretation und Konsequenzen*, 33 N.J. 68-71 (1979); Interview with Erich Honecker, Feb. 6, 1981, in 14 DEUTSCHLAND ARCHIV 318, 320-21 (1981). The 1973 admission of both the FRG and the GDR to the United Nations, as well as the practice of an increasing number of states that permit East Berlin to exercise protective powers over GDR passport bearers abroad, make the GDR's position the more tenable for purposes of this analysis. *See generally* G. RESS, DIE RECHTSLAGE DEUTSCHLANDS NACH DEM GRUNDLAGENVERTRAG VOM 21. DEZEMBER 1972, at 203-14 (1978); Scheuner, *Die deutsche einheitliche Staatsangehörigkeit: Ein fortdauerndes Problem der deutschen Teilung*, 34 EUROPA ARCHIV 345-56 (1979); *see supra* note 43.

96. For a collection of materials relating to the duty of states to guarantee foreigners a minimum standard of justice and safety within their borders, *see* L. SOHN, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973). See especially The Chattin Case, Mexico v. United States, General Claims Commission, 4 RIAA 282-312 (1951).

specific binding international agreement to the contrary, do not indicate in the sources of international law that a State need eschew demands for material compensation in negotiating with another State the terms of a premature release of persons serving criminal sentences. In other words, if no rule of international law prohibits the GDR from hanging a price over the heads of East German citizens, the same probably holds true for their West German cellmates.[97]

The history of the past century is replete with examples of state traffic in human beings.[98] Since World War II, however, the annals have been virtually bare of condemnations of state involvement in peacetime ransom hostage-taking as a violation *per se* of general international law.[99] While many of the seizures and payments have not been well-publicized, it appears that participant states have shrouded them in silence for political or strategic reasons, and not because of a belief that such transactions (performed upon persons lacking diplomatic immunities and under color of national law) are illegal. The silence of other states and publicists upon learning of the arrangements promotes the persuasiveness of this conclusion. Sufficient to illustrate the point are several historical examples of one state trading or proposing to trade its nationals to another in exchange for material concessions.

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97. The precise number of West German citizens ransomed out of East German cells remains a state secret. However, insofar as payments for the release of *West* Germans are made, the claim that payments are demanded solely to compensate the GDR for resources "wasted" upon the exiting individuals is discredited. Of course, defenders of the GDR's position could assert that payments for East German prisoners are made to offset resources expended in their upbringing, while payments for West Germans are made to offset the damage their criminal acts inflicted upon the GDR.

98. *See* K. LANGENSTEIN, *supra* note 88, at 66-175; R. KELLER, DER GEISEL IM MODERNEN VÖLKERRECHT 13-18 (1932). Obviously, the definition of the phrase "traffic in human beings" [*Menschenhandel*] is rather elastic. Extraditions which involve a negotiated *quid pro quo* could be viewed as a kind of traffic in human beings, for example. The recent Iranian hostage crisis provided a spectacular illustration of inter-governmental haggling over the terms of an exchange involving captives. Only passing mention is made of the Iranian deal here, however, because it involved elements which clearly set it apart from the intra-German deals, *e.g.*, diplomatic immunities, non-Iranian hostages, a settlement trained upon Iranian (not American) assets.

99. *See generally* K. LANGENSTEIN, *supra* note 88, at 232-45. Langenstein studied the post-1945 works of 34 prominent legal commentators from 8 countries and found that the overwhelming majority of them believed state hostage-taking to be legal under international law. (Langenstein's attention was focused upon state practice in martial situations.) *Id.*, at 239-45. Prior to World War II, several scholars advanced the view that hostage taking had forever died out as a practice of civilized nations, but this view was arguably wrong on the facts and was in any event refuted by the events that followed. *Id.* at 164-75; R. KELLER, *supra* note 98, at 13-18.

1. *The Case of Nazi Germany.* In December, 1938, Dr. Hjalmar Schacht, president of the German Reichsbank, proposed to George Rublee, the first director of the London-based Intergovernmental Committee on Refugees (IRR), a plan whereby Nazi Germany would both rid itself of unwanted German Jews and acquire a new source of critically needed foreign currency. Schacht's plan called for the establishment of a trust in Germany holding one and one-half billion marks worth of expropriated Jewish property. "World Jewry" would raise an equivalent amount in foreign currencies and would then lend this money as start-up capital to emigrating German Jews, using the property in trust as security for the loans. Interest and amortization of the loan would be charged against the trust, with such charges paid for in foreign currencies raised from an increase of German exports over their normal level. The obvious effect of the plan would be to move foreign currencies into Germany and Jewish refugees out, with the continuation of the latter undoubtedly contingent upon the achievement of the former.[100]

The Schacht plan underwent several permutations and spawned several committees,[101] but eventually failed because of diplomatic irresolution on both sides and fears within the democracies that involvement in the scheme might abet Germany's ends or imply approval of anti-Semetism. An object of intense criticism, the plan was also rejected by many influential parties, such as the American Jewish Congress, anti-German lobbies, and liberal publication's because it lent credence to the myth of International Jewry and because it smacked of extortion, blackmail, and refugee barter.[102] Overall, the criticism was buttressed upon moral, political, and economic foundations, and not upon a portrayal of the scheme as fundamentally incompatable with the rules of international law.[103]

A second Nazi attempt (with the compliance of the Hungarian leadership) to vend individuals under its control involved Hun-

100. D. WYMAN, PAPER WALLS 53 (1968); H. FEINGOLD, THE POLITICS OF RESCUE 49-58 (1970); A. MORSE, WHILE SIX MILLION DIED 241-42 (1967).

101. D. WYMAN, *supra* note 100, at 53-54.

102. H. FEINGOLD, *supra* note 100, at 69-89.

103. *See generally id.*, at 51-53; D. WYMAN, *supra* note 100, at 51-57; A. MORSE, *supra* note 100, at 241-51. The materials noted in the annotations provided by Feingold and by Wyman are especially useful.

garian Jews in the so-called "blood for trucks" ransom proposal of 1944. Working through intermediaries, the Nazi Government reportedly informed Washington that as many as 1,000,000 Jews scheduled for ultimate liquidation would be given their freedom in exchange for 2,000,000 cakes of soap, 200 tons of cocoa, 800 tons of coffee, 200 tons of tea, and 10,000 trucks. The ransom demand was later modified to include only the trucks and armaments for "use on the eastern front." The Western Allies indignantly dismissed the offer as a Nazi ploy to split the Alliance into two camps.[104] As the German Reich crumbled, ransom offers proliferated. Rescue advocates, such as Soly Meyer, operating out of Switzerland succeeded in freeing many Jews from the death camps in exchange for deposits of huge sums of money in blocked Swiss accounts, none of which ever actually came into Nazi possession.[105] Again, both the proposed and the executed prisoner exchange agreements of this period appear to have escaped international legal censure. Lest prisoner ransom arrangements appear a peculiarly Germanic phenomenon, an example involving exchanges between the United States and Cuba is appropriate.

2. *The Case of the United States and Cuba*. In the wake of the 1961 Bay of Pigs debacle, over eleven hundred Cuban emigres and a smattering of their American advisors, the so-called Cuban Brigade, sat moldering in Fidel Castro's prisons. A month after the abortive invasion attempt, the Cuban leader offered to exchange the prisoners to the United States for 500 D-8 Super Caterpillar bulldozers, a ransom he later modified to their cash equivalent, an estimated $28 million. Strong anti-Cuban sentiment in the United States delayed until April 1962 the American response of $28 million in pledges of agricultural products, by which time the Cubans had raised their price to $62 million. As a sign of his continued good faith, however, Castro at that time released sixty sick and wounded prisoners for a promised $2.9 million, which he later agreed to accept in medicine and food.[106] The Cuban Missile Crisis froze the negotiations at this point until November, 1962, when a special governmental task force spearheaded by James B. Donovan (who had earlier managed the Abel-Powers exchange in which

104. *See generally* H. FEINGOLD, *supra* note 100, at 270-76.

105. *Id.*, at 276-80.

106. The story of the ransom agreements with Cuba is ably and sympathetically told in A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES 468-71, 534-43 (1973). On the pre-Missile Crisis developments, see *id.*, at 468-71.

Wolfgang Vogel played an integral part) began to drum up donations from the pharmaceutical industry and others to meet Castro's demand for $62 million worth of selected medicines. In late December, 1963, after the final shipments of medicines to Cuba had been completed, 1113 Cuban prisoners were released and flown to Miami.[107] On-going efforts by Donovan and his colleagues secured by July 4, 1963, the release of nearly 10,000 Cubans and Americans from Cuban jails.[108] Like the World War II proposals, the Cuban-American agreements attracted much critical commentary, but again there apparently was no assault upon the propriety of the arrangements as a matter of international law. The caustic remarks were aimed instead at the wisdom and morality of the deals.[109]

Two less directly comparable yet nonetheless highly illuminating recent situations involving individuals detained by state actors for political reasons merit brief mention. Both demonstrate the freedom with which states use the liberty of individuals as a bargaining chip in international negotiation.

3. *Other Cases in Point.* First, in driving for a relaxation of the Soviet Union's restraints on Jewish emigration, the United States has for years dangled various economic concessions (e.g. most-favored-nation status) before the noses of the Kremlin's negotiators.[110] Second, the condemnations of the Iranian Government for violations of international law during the 1978-80 hostage crisis in Iran, featured attacks upon the actions which enabled Iran to bargain from a position of power, for example, by disregarding diplomatic immunities. However, the condemnations did not allege contraventions of international law in American and Iranian efforts to strike a negotiated solution, involving a trade of frozen Iranian assets (property) for the hostages (individuals).[111] In both cases, the conditions which made the handlings possible were assailed as vio-

107. *Id.*, at 534-43.

108. J. DONOVAN, CHALLENGES 92 (1967).

109. *See* A. SCHLESINGER, *supra* note 106, at 468-69.

110. *See* H. KISSINGER, WHITE HOUSE YEARS 1271-72 (1978) (commenting on the Jackson Amendment). *See also* Korey, *The Future of Soviet Jewry, Emigration and Assimilation*, FOREIGN AFFAIRS 67, 74-79 (1979-80).

111. See, *e.g.*, Case Concerning United States Diplomatic and Consular Staff in Tehran, United States of American v. Iran, (1979) I.C.J. 1, *reprinted in* 74 AM. J. INT'L L. 258-83 (1980). *See generally* Gross, *The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AM. J. INT'L L. 395-410 (1980); Falk, Comment, *The Iran Hostage Crisis: Easy Answers and Hard Questions, id.*, at 411-17.

lations of international law, but the participation in the handlings themselves went unchallenged.

Thus, a State's decision to release and expel prisoners before the expiration of their sentences in exchange for another State's property does not appear to be a violation of international law. In fact, such international exchanges may well help States bring themselves into compliance with human rights accords, as will be shown next.

### *D. Gordian Knots: International Covenants*

A favorite whipping boy of both critics of the GDR and proponents of the right to free migration has been the GDR's restrictive emigration policy.[112] A quick survey of some of the international covenants and proclamations concerning the right to emigrate to which the GDR has put its signature (or otherwise indicated a willingness to comply) reveals just cause for the complaints.[113]

112. *See, e.g.*, Tomuschat, *Freizügigkeit nach deutschem Recht und Völkerrecht*, 27 DIE ÖFFENTLICHE VERWALTUNG 751-65 (1974); W. SÓLYOM-FEKETE, LEGAL RESTRICTIONS ON FOREIGN TRAVEL BY THE GERMAN DEMOCRATIC REPUBLIC 14 (1978); Turack, *Freedom of Transnational Movement: the Helsinki Accord and Beyond*, 11 VAND. J. TRANSNT'L L. 585, 593-97 (1978); Mampel, *supra* note 18, at 32-34; M. KRIELE, *supra* note 48, at 32-34. For discourses upon the right to free emigration that are particularly attentive or relevant to the German situation, see Chalidze, *The Right of a Convicted Citizen to Leave His Country*, 8 HARV. C.R.-C.L. REV. 1-13 (1973); Berman, *The Right of Convicted Citizens to Emigrate: A Comment on the Essay by V.N. Chalidze, id.*, at 15-20; Toman, *The Right to Leave and to Return in Eastern Europe*, in THE RIGHT TO LEAVE AND TO RETURN 119-64 (K. Vasak and S. Liskofsky eds. 1976); F. GIL, DIE AUS- UND EINWANDERUNGSFREIHEIT ALS MENSCHENRECHT (1976); Scheuner, *Die Auswanderungsfreitheit in der Verfassungsgeschichte und im Verfassungsrecht Deutschlands*, in FESTSCHRIFT FÜR RICHARD THOMA 119-224 (1950). A path-breaking work upon the right to emigrate is J. INGLES, STUDY IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY, U.N. Doc. E/Cn.4/Sub.2/220/Rev. 1 (1963). For other commentaries of general interest, see Nanda, *The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations*, DEN. J. INT'L L. & POL'Y 109-22 (1971); Turack, *A Brief Review of the Provisions in Recent Agreements Concerning Freedom of Movement Issues in the Modern World*, 11 CASE W. RES. J. INT'L L. 95-115 (1979); Asbay, *The Right to Leave and the Right to Return*, 1 COMP. L. Y.B. 121-36 (1977); Higgins, *The Right in International Law of an Individual to Enter, Stay In, and Leave a Country*, 49 INTERNATIONAL AFFAIRS 341-57 (1973); Note, *The Relation of the Helsinki Final Act to the Emigration of Soviet Jews*, 1 B.C. INT'L & COMP. L.J. 111-47 (1977); Van Den Berg and Simons, *The Soviet Union and Human Rights Legislation: The Shchransky Case*, 11 CALIF. W. INT'L L. J. 479, 481-90 (1981).

113. A congeries of intra-German agreements containing operative obligations affecting the movement of persons between the GDR and the FRG is omitted from this quick survey. Limited in their ambition, their explication here would only distract from the development of this Article's theme. For a sampling of the special agreements, see the Agreement Between the German Democratic Republic and the Federal Republic of Germany on the

1. *The United Nations Charter*. Although the United Nations Charter contains no language explicitly endorsing a right to free emigration or shielding political dissidents from governmental harassment, Article 1, paragraph 3 of the Charter does instruct its signatories (including, since 1973, the GDR) to cooperate in "promoting and encouraging respect for human rights and for fundamental freedoms for all. . . ."[114] Although arguably qualified by the Article 2, paragraph 7 reservation of matters "essentially within the domestic jurisdiction of any state" to the signatories, the Charter is of unquestionable relevance where, as in the case of the GDR, a state has "internationalized" the subjects of its alleged transgressions by ratifying international covenants and participating in the formulation of multinational declarations.[115]

2. *The Universal Declaration of Human Rights*. With regard to the right to emigrate, the 1948 Universal Declaration of Human Rights[116] proclaims:

> Article 13
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country.[117]
>
> Article 14
>
> (1) Everyone has the right to seek and enjoy in other countries asylum from persecution.

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Transit Traffic of Civilian Persons and Goods between the Federal Republic of Germany and Berlin (West), Dec. 17, 1971, *reprinted in* BUNDESMINISTERIUM FÜR INNERDEUTSCHE BEZIEHUNGEN, ZEHN JAHRE DEUTSCHLAND POLITIK 169-74 (1979); Arrangement between the Government of the German Democratic Republic and the Senate on Facilitating and Improving the Traffic of Travellers and Visitors, Dec. 20, 1971, *reprinted in id.*, at 175-78, *and in* 11 INT'L LEGAL MAT. 726 (1972); Treaty on the Basis of Intra-German Relations, June 20, 1973, German Democratic Republic-Federal Republic of Germany, *reprinted in* 12 INT'L LEGAL MAT. 16 (1973). *See generally* G. RESS, *supra* note 95. Also worth mentioning but peripheral to this discussion because of the GDR's non-participation in it is the European Convention of Human Rights, which in Protocol No. 4, Art. 2, Para. 2, guarantees the right to emigrate. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Protocol No. 4 *done* Sept. 16, 1963.

114. U.N. CHARTER, art. 1, para. 3. (Ratified by the GDR on Sept. 23, 1973. GB1.DDR II, No. 14, at 145 (1973).) The Preamble to the Charter notes that one of the ends that inspired the foundation of the United Nations was the aim "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person."

115. Mahnke, *Menschenrechte und nationales Interesse*, 22 RECHT IN OST UND WEST 193-206 (1978).

116. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/811 (1948).

117. For a description of Article 13, paragraph 2's "legislative history," see F. GIL, *supra* note 112, at 130-34.

Article 15

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.[118]

The impediments which the GDR has placed on westward migration obviously derogate from these provisions.

Also of pertinence to the GDR's treatment of political prisoners, but too broad in scope to be thoroughly discussed here, are the Declaration's assertions. Under Article 2, no one shall be denied the rights and freedoms set forth in the Declaration because of political or other opinion. Under Article 5, no one shall be subjected to degrading treatment. Under Article 6, everyone has the right to recognition as a person before the law, and, finally, under Article 19, everyone has the right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive, and impart information and ideas regardless of frontiers.[119]

As recently as 1975, the GDR formally acknowledged an obligation to adhere to the Declaration.[120] Yet, because the Declaration was promulgated as a non-binding General Assembly Resolution,[121] and because the practice of States has not yet ensconded the aforementioned provisions in the firmament of universally recognized immutable rights,[122] it is difficult, relying solely

118. The availability of Article 15 as a device for criticizing the GDR is made problematic by the complex German nationality question. *See* note 95, *supra*. There is considerable disagreement as to whether there is one German nationality, two separate German nationalities, one German nationality with two state citizenships, *etc*.

119. On the GDR's repressive political controls, see the sources cited in note 23, *supra*; GESICHT ZUR WAND, *supra* note 33.

120. In principle VII of the non-binding Final Act of the Conference on Security and Cooperation in Europe, the Parties agreed:

> In the field of human rights and fundamental freedoms, the participating states will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. . . .

73 DEP'T ST. BULL. 323, 325 (1975); 14 I.L.M. 1292, 1295 (1975).

121. The ratification of several binding human rights Covenants has made the controversy over the binding or non-binding nature of the Declaration less critical than it once was, at least with respect to the right to emigrate. On the non-binding nature of the Declaration, see Judge Lauterpacht's Seperate Opinion in the Southwest Africa Case: Voting Procedure, [1955] I.C.J. 114-21; G. SCHWARZENBERGER, 3 INTERNATIONAL LAW 282-85 (1976); M. WHITEMAN, 5 DIGEST OF INTERNATIONAL LAW 243 (1965). *Cf.* Comment, Aliyah *of Soviet Jews: Protection of the Right of Emigration under International Law*, 14 HARV. INT'L L.J. 89, 97-99 (1973) (stressing the authority of the Declaration); South West Africa Cases, Second Phase, [1966] I.C.J. 6, at 293 (Tanaka, J., dissenting, noting that "although not binding in itself, [the Universal Declaration] . . . constitutes evidence of the interpretation and application of the relevant Charter provisions").

122. *E.g.*, among the Communist states, only Cuba recognizes a right to free emigration.

upon the Declaration, to pin the GDR with a violation of international law.

3. *International Human Rights Agreements*. The International Convention on the Elimination of All Forms of Racial Discrimination,[123] ratified by the GDR on March 27, 1973, binds all participating States under Article 5, "to guarantee the right of everyone. . . to equality before the law . . .in the enjoyment of. . . [t]he right to leave any country including one's own, and to return to one's country." Although expressly targeted against discrimination on the basis of "race, colour, or national or ethnic origin," the language of Article 5 does not restrict its operation to these categories. Discrimination on the basis of age, such as the GDR's practice of permitting pensioners but few younger East Germans to visit the FRG,[124] arguably falls within the Convention's prohibition. More important than the question of whether the GDR unlawfully discriminates, however, is its ratification of a document listing the right to emigrate as a fundamental human right.

The International Covenant on Civil and Political Rights,[125] ratified by the GDR on March 27, 1973, provides under Article 12 that "[e]veryone shall be free to leave any country, including his own." Although qualified by an *ordre public* derogation clause, discussed below, this bold statement of right casts long shadows over the purported legality of the GDR's entire emigration control scheme.

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The guarantee of a right to emigrate included in the GDR's 1949 Constitution was deleted from the 1968 Constitution. *See* VERF.DDR, Art. 10 (1949); S. MEMPEL, DIE SOZIALISTISCHE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK, TEXT UND KOMMENTAR 218-31, 236-47, 695-700 (1972). *See generally* P. BENGELSDORF, DAS RECHT ZUM VERLASSEN DES STAATSGEBIETES IN DEN DEUTSCHEN VERFASSUNGEN VON 1919-64, 321-22 (1965). *See also* D. CHILDS, EAST GERMANY 88 (1969) (contending that the GDR's issuance of passports at the state's convenience on a purely political basis was indistinguishable from the 1969 practice of many Communist states and assorted Western nations, such as Portugal, Spain, Turkey, Greece, and Iran).

123. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195. Ratified by the GDR on March 27, 1973.

124. *See supra* note 13.

125. International Covenant on Civil and Political Rights, 21 U.N. GAOR, Supp. (No. 16) 52-58, U.N. Doc. A/6316 (1966). The Covenant came into force on March 23, 1976. 13 U.N. CHRON. 73 (1976). The GDR ratified it on Nov. 8, 1973. The FRG followed suit on Dec. 17, 1973. The GDR's overall performance under this Covenant is evaluated in Bruns, *Menschenrechtspakte und die DDR*, 11 DEUTSCHLAND ARCHIV 848-53 (1978).

Among the parts of the Covenant more directly opposed to features of the GDR's treatment of political prisoners, particularly with regard to their "sale," are Article 7 (prohibition of degrading treatment); Article 10 ("[a]ll persons deprived of their liberty shall be treated with . . . respect for the inherent dignity of the human person"); Article 18 (freedom of conscience); Article 19 (freedom of opinion); and Article 22 (freedom of association).[126]

Thus, both the GDR's practice of incarcerating would-be refugees and its manner of granting their freedom (that is, by treating them as articles of commerce, like prize cattle or swine) are suspect under this Covenant.

4. *Helsinki Declaration*. As with the Universal Declaration, the GDR in 1975 proclaimed in Principle VII of the non-binding Helsinki Declaration that it would "fulfill. . . [its] obligations as set forth in the international declarations and agreements in . . . [the human rights] field, including, *inter alia*, the International Covenants on Human Rights by which . . . [it] may be bound."[127] In the Final Act of the Conference on Security and Cooperation in Europe (CSCE) held at Helsinki,[128] the GDR not only pledged to respect the Charter of the United Nations, the International Covenants on Human Rights, and other existing international human rights declarations and treaties, but also joined in giving detailed (albeit non-binding)[129] assurances of its intent to relax its restrictive

126. Articles 12, 18, 19, and 22 contain "*ordre public*" derogation clauses. For more on these clauses, see *infra* notes 147-51 and accompanying text.

127. Final Act, Conference on Security and Cooperation in Europe, 73 DEP'T ST. BULL. 323, 325 (1975); 14 I.L.M. 1292, 1295 (1975).

128. *Id.*

129. "The Helsinki Final Act does not create new and *immediate* legal obligations. It either confirms the existence of preexisting legal obligations, sometimes making them more specific, or it gives rise to moral and political obligations." Jonathan and Jacqué, *Obligations Assumed by the Helsinki Signatories*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 48 (T. Buergenthal ed. 1977). *See also* Mahnke, *Die Prinzipienerklärung der KSZE-Schlussakte und das Völkerrecht — Völkerrechtliche Aspekte der deutschen Frage*, 21 RECHT IN OST UND WEST 45, 46 (1977); Mahnke, *supra* note 115, at 205-06; Russell, *The Helsinki Declaration: Brobdingnag or Lilliput*, 70 AM. J. INT'L L. 242, 246-49 (1976); Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AM. J. INT'L L. 296 (1977); Schweissfurth, *Zur Frage der Rechtsnatur, Verbindlichkeit und völkerrechtlichen Relevanz der KSZE-Schlussakte*, 36 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 681-726 (1976). Nonetheless, the Helsinki Accord has been termed a document of "great legal significance." Buergenthal, *International Human Rights Law and the Helsinki Final Act: Conclusions*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 6-7 (T. Buergenthal ed. 1977); Turack, *A Brief Review of the Provisions in Recent Agreements Concerning Freedom of Movement Issues in the Modern World, supra* note 112, at 105. The GDR's representative to the Conference, in fact, characterized the Final Act

regime of border controls.

"Basket Three" of the Declaration included explicit promises to promote the reunification of families, to expand personal contacts between the citizens of all participating states, to improve the movement of information across borders, and to facilitate the transfrontier movement of persons for personal or professional reasons. With regard to the last-mentioned point, the GDR expressed its intent "gradually to simplify and to administer flexibly the procedures for exit and entry; to ease regulations concerning movement of citizens from the other participating states in their territory, with due regard to security requirements. . .[and] to lower, where necessary, the fees for visas and official travel documents."[130] While not expressly endorsing a general right to emigrate, the GDR reaffirmed its commitment to documents that do, and provided its cosignatories with ample standing to challenge the GDR's implementation of its Helsinki pledges.[131]

## III. THE INTRA-GERMAN ARRANGEMENT: MERITS AND DEMERITS

### *A. Merits*

Ironically, the GDR's systematic sale of political prisoners to the West not only escapes outright condemnation under international law (that is, the prescriptions against slavery and hostage-taking), but in a qualified and paradoxical way, it actually merits a word of commendation, for the ransom deals advance a goal at the heart of the provisions on free emigration and political expression in the human rights documents mentioned above. To put the obvious point succinctly, the exchanges foster the transnational movement of persons and ideas. By means of transplantation, the

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as an international instrument and its catalog of principles as directly applicable international law. *See* Bock, *Festigung der Sicherheit in Europa, Kernstück der Schlussakte von Helsinki*, 20 DEUTSCHE AUSSENPOLITIK 1263, 1630 (1975); Neues Deutschland, Oct. 3 and Oct. 4/5, 1975, *reprinted in* 8 DEUTSCHLAND ARCHIV 1207 (1975). *See also* Chowdhury, *Human Rights and the Helsinki Accords: Belgrade and Beyond*, in CONFERENCE ON THE LAW OF THE WORLD, 9TH, MADRID (PROJECTED WORK PAPERS), NO. 13 (1979) (arguing that the Final Act is binding despite the numerous disclaimers of the parties).

130. 73 DEP'T ST. BULL. 323, 339-48 (1975); 14 I.L.M. 1292, 1313-24 (1975).

131. *See* Henkin, *Human Rights and "Domestic Jurisdiction"*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 35 (T. Buergenthal ed. 1977); Turack, *A Brief Review of the Provisions in Recent Agreements Concerning Freedom of Movement Issues in the Modern World, supra* note 112, at 105-06.

exchanges liberate individuals from repressive governmental strictures on their ability to cultivate and express their political, economic, or philosophical identities. Thus, in a neat bundling of interests, the intra-German exchanges simultaneously promote high humanitarian ideals and serve the less lofty ends of the participant states.

In human terms, this means that individuals who would have otherwise suffered in harsh prison conditions and afterwards borne a stigma of untrustworthiness instead are able to resume full productive lives in the West.[132] On the other side of the border, East German consumers deprived by political circumstance from access to certain goods are permitted, as a result of the ransom shipments, to enhance their lives with desired articles. Surely few of the individuals directly touched by the exchanges would complain of a denigration of their human dignity on account of the manner by which the Bonn Government redeemed their liberty. In fact, one could argue that the West German payments are no more than grandiose international versions of the fines paid in lieu of incarceration in petty domestic cases. The practice proceeds so routinely that the GDR could be said to be engaging in tacit sentencing-in-the-alternative ("five years or two years and $30,000").

On a more exalted plane, the ransom deals serve an aim of international law insofar as they serve as a peaceful means of dispute avoidance and resolution.[133] As intermediary Vogel observed, "[o]ur activity is a factor in the relaxation of tensions between East and West. Every spy, every refugee, every dissident that we exchange is one problem less, one source of friction fewer between both German states, and, consequently, between East and West."[134]

### *B. Demerits*

These "merits" notwithstanding, there exists an obvious, and perhaps countervailing, pair of "demerits" which must also be considered. The first demerit, has a positivistic slant, while the latter appeals to naturalistic leanings.

First, the intra-German arrangements simultaneously rest

132. This is not to imply that West Germany is nirvana for all the released prisoners. The problems of adjustment to capitalist society have nudged a disproportionately large number (but still a minority) of the freed East Germans into alcoholism or political extremism. *See* Raguse, *supra* note 3, at 588-90; Bayernkurier (Munich), May 26, 1979, at 28, col. 1.

133. *See* U.N. CHARTER, art. 1, para. 1; *id.*, art. 2, para. 3.

134. *Quoted in* M. MEYER, *supra* note 5, at 215. [Translation by author.]

upon and buttress a variety of East German human rights violations, particularly the persistent violation of the right to emigrate. Although not universally accepted,[135] the right to emigrate is one to which the GDR repeatedly subscribes in international fora, only to deny in both rhetoric and deed at home. The GDR's insistence upon an auto-interpretation[136] of its *binding* commitments in this area has justifiably won it censure in the writings of publicists[137] and before the United Nations Human Rights Commission.[138] The inseparable entanglement of the intra-German deals in the underlying strata of human rights violations is easily illustrated. If the GDR either tolerated political dissent or opened its borders, the GDR's reservoir of political prisoners within the GDR would probably swiftly dry up or drain away into the West. Additionally, the market for East German prisoners would for the most part vanish, provided the Bonn Government were wise enough not to pay for exits which could have been or would eventually be cost-free. It is obvious that if the GDR fully respected its commitments under the International Covenant of Civil and Political Rights, a systematic traffic in political prisoners could not exist.

Through the export of dissidents, the satisfaction of consumer demands, and so on, the intra-German deals perpetuate human rights violations by relieving domestic and international pressure for alterations in the GDR's notoriously repressive security system. The deals also help to offset the costs of administering the system, both in terms of bringing the GDR coveted Western articles at no monetary cost and in terms of saving the state otherwise unavoidable prison expenditures.[139]

A battery of arguments can be employed to defend the GDR's impugned practices. Five of the most common of them are summarized here. Appended to each, for comparison's sake, is a clipped

135. *See supra* note 122.

136. On the auto-interpretation problem, see Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY 59-88 (G. Lipsky ed. 1953).

137. *See, e.g.*, Higgins, *supra* note 112, at 353; Mahnke, *Die Prinzipienerklärung der KSZE-Schlussakten und das Völkerrecht, supra* note 130, at 121. *But see* Buchholz and Wieland, *Der Fall Weinhold — eine Kette von Rechtsbrüchen der BRD-Justiz*, 1977 N.J. 22, at 26 (denying individuals have a right to emigrate).

138. *E. Germany Censured over Human Rights*, The Times (London), Feb. 28, 1981, at 4, col. 5.

139. *See supra* note 65.

paragraph mentioning a possible deficiency or two in the pro-GDR position.

1. Argument

The treatment by the GDR of its own citizens is a matter of purely domestic concern. Criticism of the GDR's internal political controls constitutes impermissable foreign interference in East German affairs.[140]

H.C. Ivo Lapenna made short work of this type of argument, however, when he wrote:

Such impossible claims hardly deserve any comments. They are contrary to the universal character of human rights, to the duty of the United Nations to promote the respect for these rights everywhere in the world, to the recognized close link between the respect for human rights and the maintenance of peace, and to the duty of states to observe them. These claims are also contrary to Principle VII which is an integral part of the (Helsinki) Final Act and which entitles the signatories to promote jointly and separately the universal and effective respect for human rights. Of course, States are free to enter or not to enter into treaty relations with other States. That is their sovereign right. But if as sovereign States they decide to bound [*sic*] themselves by a treaty in their common interest, then they necessarily restrict their full sovereignty in respect of the matter regulated by the treaty.[141]

2. Argument

"Bourgeois" human rights constructs are invalid under socialist conditions. In the Marxist-Leninist state, the people, acting with the guidance and through the Communist Party, define the genuine body of human rights. These rights guarantee the individual participation in, and not protection from, the state. The people need no metaphysically anchored safeguards because they rule themselves. Provisions of international human rights agreements at odds with state policy are therefore irrelevancies.[142]

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140. *See, e.g.*, Doernberg, *Gipfeltrennen für den Frieden*, 25 DEUTSCHE AUSSENPOLITIK (No. 8) 5, 13 (1980). For a careful analysis of the intervention problem, see Beyerlin, *Menschenrechte und Intervention: Analyse der west-östlichen Menschenrechtskonventionen von 1977/78*, in ZWISCHEN INTERVENTIONEN UND ZUSAMMENARBEIT 157, 173-88 (Simma & Blenk-Knocke eds. 1979).

141. Lapenna, *Legal Nature of the CSCE Final Act and Human Rights under International and Soviet Law*, 18 JAHRBUCH FÜR OSTRECHT 9, 17-18 (1977). *See also* Ebiasah, *Protecting the Rights of Political Detainees: The Contradictions and Paradoxes in the African Experience*, 22 HOW. L. J. 249, 266-69 (1979).

142. Classic expositions of the GDR's position may be found in Poppe, *The Basic Rights of Socialist Man in the GDR*, 6 GERMAN FOREIGN POLICY 410-19 (1967); Poppe, *The UN Declaration of Human Rights and the Constitution of the GDR*, 7 GERMAN FOREIGN POLICY

Leaving aside any dispute over the truth of its factual claims, it is sufficient to note that this argument is a prescription for international anarchy in treaty relations. The argument belies the very nature of international agreements by denying them any authority if they contradict state wishes.

3. Argument

> The GDR's border and internal controls are security measures, not unlike those enforced in every state as a standard aspect of sovereign self-preservation. The GDR's "front-line" position requires the state to take some special precautionary measures to preserve international peace.[143]

Obviously, the denuded death strips lining the GDR's borders to the West are anything but routine. Even if a group of socialist states impose security controls similar to those of the GDR, no satisfactory justification of a derogation from an express treaty obligation is achieved by a showing that a state is not alone in its derogation.

4. Argument

> (4) International human rights instruments are to be implemented gradually and as wholes. To condemn the GDR for not complying with their every jot is: (1) to ignore present realities which states have in mind when they make human rights agreements; (2) to rush a program designed to be absorbed into practice over a prolonged period; and, (3) to turn a blind eye to Western shortcomings in the human rights field, particularly fail-

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203-10 (1968); Poppe, *Die Bedeutung der Grundrechte und Grundpflichten des Bürgers in der sozialistischen Gesellschaft*, 1978 N.J. 326-28. For richly annotated Western discussions of the GDR's rejection of natural right, see Blumenwitz, *Selbstbestimmung und Menschenrechte in geteilten Deutschland*, 17 JAHRBUCH FÜR INTERNATIONALES RECHT 11, 30-33 (1974), Mahnke, *Die Prinzipienerklärung der KSZE-Schlussakte und das Völkerrecht, supra* note 129, at 119-20.

143. On the putative normality of the GDR's measures, see Honecker, *There is No Alternative to Peaceful Coexistence*, in E. HONECKER, THE GERMAN DEMOCRATIC REPUBLIC, PILLAR OF PEACE AND SOCIALISM 76-77 (1979); 15. Juni 1961: Pressekonferenz des Staatsvorsitzenden Ulbricht, in DOKUMENTE ZUR DEUTSCHLANDPOLITIK, Series IV, Vol. 6, Half-Vol. 2, 925, 931 (R. Salzmann ed. 1975). On their legality as measures of self-defense, see Felber, *The Protection of the GDR State Frontier in the Light of International Law*, 5 GERMAN FOREIGN POLICY 107-23 (1962); Mühlberger, *Grenzverletzer werden streng zur Verantwortung gezogen*, 7 DEUTSCHE AUSSENPOLITIK 1274, 1275 (1962); Schirmer, *Völkerrecht stützt Schutzmassnahmen der DDR, id.*, 1280, 1281-83; Kohl and Krusche, *Völkerrechtliche Gedanken zu den Schutzmassnahmen der Deutschen Demokratischen Republik vom 13. August 1961*, 6 DEUTSCHE AUSSENPOLITIK 1147-54 (1961). *See generally*, Palenberg, *supra* note 7, at 99-108.

ure to secure economic rights and arms limitation.[144]

The developments of the past five years reveal an East German tendency toward the tightening of state controls on individual movement and political expression in the GDR.[145] Evidence of a serious intent in the minds of the GDR's leadership to honor a general right to emigrate is lacking. With regard to the GDR's complaints about Western inertia, one need only note that little progress can be made if the GDR insists that other states substantially fulfill their human rights pledges as a condition precedent to action on its own part. In any event, two state wrongs do not amount to respect for human right.

5. Argument

"Escape clauses" in the Universal Declaration of Human Rights,[146] and the International Covenant on Civil and Political Rights,[147] and other human rights documents[148] permit East

144. "Our aim is, therefore, step by step to implement the whole of the [Helsinki] Final Act which, in actual fact, is a programme for a prolonged period ahead. In so doing, we will take a stand against any delays or attempts *to treat parts of the document separately*. The Helsinki Final Act is an *organic whole* and the GDR wants to see implemented as such." WHAT IS LIFE LIKE IN THE GDR? 56 (Panorama DDR, 1977). [Emphasis added.] *See also* Doernberg, *supra* note 140, at 13; Hänisch, *SchluBakte von Helsinki — langfristiges Programm zur Festigung des Friedens, der Sicherheit und der Zusammenarbeit in Europa*, 24 DEUTSCHE AUSSENPOLITIK (No. 7) 90-94 (1979); FREEDOM AND DEMOCRACY: FOR WHOM AND FOR WHAT? 38-40 (Panorama DDR, 1977).

145. *See supra* note 23.

146. Article 29, Paragraph 2, of the Universal Declaration, *supra* note 116, provides:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

147. Article 12 of the International Covenant on Civil and Political Rights, *supra* note 125, states in part:

> . . .
> (2) Everyone shall be free to leave any country, including his own.
> (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the rights recognized in the present Covenant.

Similar qualifications are incorporated in Articles 18 (freedom of religion); 19 (freedom of opinion and expression), 21 (freedom of assembly), and 22 (freedom of association). See also Article 4 (permitting derogations from the Covenant in times of public emergency).

148. *See generally* Frowein, *The Interrelationship Between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 71, 74-77 (T. Buergenthal ed. 1977). For passing considerations of some of the thornier aspects of escape clauses in human rights agreements in general, see Green, *Derogation of Human Rights in Emergency Situations*, 16 CANADIAN Y.B. INT'L L. 92-115 (1978); Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L. J. 1-52 (1981).

> German lawmakers to abridge many absolute guarantees of right if necessary for the protection of key state interests, such as "public health or morals," "the general welfare in a democratic society," "public order," or "national security." The GDR's security measures fit neatly within the parameters of these clauses. The measures shield the state from foreign subversion and from a ruinous "brain drain" to the West.[149]

Paranoiac rulers may perceive a threat to public order in almost any dissident activity. Any emigration, for example, could easily be viewed as a threat to public order because of the loss of manpower and the effect on the state's image which it might entail.[150] If the political rights shielded by international human rights agreements are to have any content, their *ordre public* escape clauses must be read narrowly. The GDR's interpretive tack is untenable because it transforms an escape clause, clearly intended as an exception, into a general rule, thus, in effect, nullifying the grant of the right itself.[151]

Second, the intra-German arrangements arguably offend fundamental concepts of decency. Through their tribunals and actuaries, states routinely attach monetary values to the life and liberty of their citizens (for example, by awarding judgments in wrongful death actions). Similarly, private businessmen of many stripes must calculate in among the costs of their undertakings the cost of a few worker's lives. For eminently practical reasons, in circumstances such as these, "priceless" human life is tagged with a cold cash value. While perhaps initially unsettling to the sentimental or naive, such practices are not ordinarily deemed odious or suspect.[152] In the case of the intra-German prisoner ransom deals, however, there is legitimate ground for unease, for they institute on the soil of modern Germany a brokerage in human flesh. By the operation of the deals, thousands of human beings are systematically placed on the trading block each year, their destinies determined by Bonn's willingness to ante up funds for their purchase.

149. *See* note 143, *supra. See also* FREEDOM AND DEMOCRACY: FOR WHOM AND FOR WHAT? 38-40 (Panorama DDR, 1977).

150. *See*, Comment, Aliyah *of Soviet Jews: Protection of the Right of Emigration under International Law*, 14 HARV. INT'L L. J. 89, 100-01 (1973).

151. Frowein, *supra* note 148, at 74-75; Mampel, *supra* note 18, at 152-53.

152. Where a manufacturer appears particularly callous, however, public indignation may be stirred. See the report on the Ford Pinto product liability controversy in N.Y. Times, June 10, 1979, at 76, col. 1.

The method by which persons are shipped to the West bears earmarks of the old-time slave trade: a bargain is struck, individuals are herded from confinement onto transports and carried into an alien world, in most cases never to see their families and friends again. Of course, the willing attitude of the modern "victims" and their subsequent liberty distinguish the two situations, but the imperfect analogy offers itself nonetheless. Arguably inherent in the modern deals is the temporary reduction of man to chattel-like status, to the place of a common article of commerce. And in this respect, it can be argued that the deals denigrate the human dignity of the persons dealt.[153] The deals may thus well be morally, if not legally, contemnable.

## IV. AN INTERNATIONAL SOLUTION? AN ALEXANDRIAN STROKE?

Perhaps the standards of international public morality have evolved to a point where state traffic in human beings should be placed on a par with private trafficking and be prohibited by international agreement. Certainly if more states follow the lead of the Iranian Government in trading hostages for economic concessions from foreign states, a ban of this nature will take on a new lustre in the eyes of many.

The most accurately targeted prohibition would ban the *offering* of *individuals* in trade for anything other than other individuals. A formulation along these lines would avoid branding as culpable the understandable rush of a state to rescue persons trapped in what it perceives as unjust or inhumane foreign captivity. It would also permit person-for-person exchanges. Even though such exchanges can provide opportunities for international extortion, they should be spared for their redeeming features, notably: (1) they confer obvious humanitarian benefits even-handedly; (2) they avoid the opprobrious "pricing of souls" and payment of "blood money;" and, (3) they are unlikely to develop into a full-blown ongoing business, for they provide no state with a chance to plunder another state's treasury.

153. *But cf.* Flood v. Kuhn, 407 U.S. 258 (1972) (involving the "trading" of professional athletes in the United States); Comment, *Player Control Mechanisms in Professional Team Sports*, 34 U. PITT. L. REV. 645-70 (1973) (describing the "ownership" of players by clubs). West German journalist Peter Jochen Winters suggested that the payment of annual lump sums by West Germany and the release of prisoners on a non-specific basis might cleanse the transactions of their barter block unsavoriness. Frankfurter Allgemeine Zeitung, Nov. 1, 1979, at 10, col. 2.

Were a prohibition of this kind widely accepted, it would bring the weight of international law against the unsavory merchandising of persons, and, in the process, help remove a temptation which can lead states to violate related and well-recognized human rights. An obvious incentive to states to treat individuals shabbily would be expressly disavowed by the international community. In Germany, such a prohibition would put pressure on both the GDR and the FRG to come to grips with the realities (and inconsistencies) underlying their exchange policies. As new members of the United Nations community, the GDR and the FRG are particularly sensitive to influences upon their international standing.

A powerful disadvantage of an effective prohibition along the lines suggested here would be that individuals trapped in East German prisons would see one of their best hopes for an early release and a swift move to the West extinguished. For them, abstract hopes for long-term societal gains as a result of a total prohibition would offer cold comfort indeed. An additional disadvantage, to name but one, would be that a familiar avenue for East-West consultation and cooperation — a tie binding the interests of both German governments — would necessarily disappear. An attempt to resolve the conflicting tensions which the serious promotion of a convention of this type would raise is beyond the ambition of this Article.

## V. CONCLUSION

In framing attacks upon the intra-German political prisoner exchange arrangements, commentators have been often injudicious in their applications of terminology with legal content. The deals involve neither "slave-trading" nor some kind of *ultra vires* state kidnapping or hostage-taking. In fact, the deals as such apparently fit nowhere within the schemes or under the rubrics of practices hitherto forbidden by international law.

Still, the critics' instincts have not entirely misguided them. At least some features of the deals seem to involve a departure from the spirit, if not the letter, of the international law of human rights. In so fluid and controversial an area of the law, literalism cannot be the only measure of right. Perhaps the intra-German trades are so tainted by the matrix of shadowy and probably illegal practices from which they emerge that although they may themselves escape

denunciation, when considered in isolation from their environment, they should nonetheless be decried.

Unfortunately, a consequential criticism of the deals would probably accomplish no more than their termination, an achievement of dubious merit when one considers their praiseworthy, humanitarian aspects as well as their flaws. The GDR's systematic infringement of human rights would undoubtedly persist. The nature of the dilemma faced by the GDR's leaders was described by one astute statesman centuries ago:

> (A) prince "cannot possibly exercise all those virtues for which men are called "good." To preserve the state, he often has to do things against his word, against charity, against humanity, against religion.
>
> N. Machiavelli, *Il Principe*, XVIII (1532)