

Victors' Justice: Court of Human Rights and the Conviction of East German Leaders

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[1] On 22 March 2001, a Grand Chamber of the European Court for Human Rights issued its judgment in the consolidated applications of three political and military leaders of the former German Democratic Republic (East Germany), all of whom had been convicted (after German reunification) of being indirect principles to intentional homicide in association with the deaths of East Germans who had attempted to flee across the border separating East and West Germany. (1) For most of the Cold War the border was heavily secured by the infamous "wall", anti-personnel mines, automatically triggered firearms, armed border guards and barbed wired. The applicants were Fritz Strelitz (GDR Deputy Minister of Defense – sentenced to 5½ years), Heinz Kessler (GDR Minister of Defense – sentenced to 7½ years) and Egon Krenz (President of the Council of State – sentenced to 6½ years). *German Law Journal* reported on the oral argument before the Human Rights Court in the consolidated cases in its issue from 15 November 2000 (Vol. 1; 03/2000).

[2] The Human Rights Court found (chiefly) that the convictions and sentences did not constitute a violation of Article 7 § 1 of the Convention, which prohibits *ex post facto* criminal proceedings.

[3] The cases, of course, bear tremendous symbolic and historic meaning. The Berlin Wall, from its construction in 1961, served as the most prominent symbol of the ideological divide between Soviet Communism and Western Market Democracy. It was enlisted to such symbolic service by two U.S. Presidents who were separated by more than 20 years of the Cold War. Kennedy's "ich bin ein Berliner" speech in Berlin in 1963, and Reagan's demand that Mr. Gorbachev "tear down this wall" in 1987, can be seen as bookends to the Cold War, with the Wall as the symbolic constant at the center of the struggle. For this reason it was necessary that the defeated communists should, especially, be made to account for the policies justifying the Wall; only the criminal repudiation of the Wall could crown the West's ideological victory.

[4] Involving the highest ranking political and military leadership of the fallen East German state and focused as they were on the Berlin Wall, it is no stretch to view the cases as the Cold War's Nuremberg Trials, even though the handful of border deaths at issue in the cases (while individually significant) cannot be taken to adequately speak for the millions of victims of Soviet Communism in the same way that the Nuremberg trials were meant to symbolically bring judgement on the sweeping and indescribable crimes of the Nazis, including the Holocaust. The post-unification German courts, as well as the European Court for Human Rights, recalled the Nuremberg Trials in their consideration of the legitimacy of these cases.

[5] As with the Nuremberg Trials, these cases raise broad questions about the relationship between the law and the social/political system, now defeated, that it once served. They are questions of power, in spite of the Court's best efforts to cast the issues in these cases primarily in legal terms. Regrettably, the Court's majority judgement pays too little attention to these questions and the phantom of power politics that lurks behind the cases.

A. The Judgment of the Human Rights Court

The Law

[6] The applicants' central claim was that their trials and convictions (by newly reunified German courts) for murder based on the lethal use of force at the East German border constituted *ex post facto* procedures in violation of Article 7 § 1 of the Human Rights Convention. Article 7 § 1 provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The Court reasserted the standards, which it had set out in previous decisions, for the application of Article 7 § 1. The basic rule, the Court explained, is that the provision of criminal law must be both accessible to and foreseeable by the party that now stands convicted of a crime:

The individual [must] know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

(*Strelitz, et. al. v. Germany*, 22 March 2001 (<<http://hudoc.echr.coe.int>>, pp. 25-27 § 50); quoting *S.W. v. United*

Kingdom, 22 November 1995 (Series A no. 335-B, pp. 41-42 §§ 34-36) and *C.R. v. United Kingdom*, 22 November 1995 (Series A no. 335-C, pp. 68-69 §§ 32-34).

[7] The post-unification German courts applied the criminal law of the former East Germany to the cases, pursuant to the rules established by the German Unification Treaty (31 August 1990) and Unification Treaty Act (23 September 1990). The East German criminal law provisions were substituted by the West German criminal provisions making it punishable to be an indirect principle to an intentional homicide (Federal German Criminal Code Articles 212 and 25) because they were more lenient. The post-unification German courts also based the convictions on international law, particularly the rights to life (Articles 2 and 6) and freedom of movement (Article 12) established by the United Nations International Covenant on Civil and Political Rights, which East Germany had ratified in 1974.

The Court's Reasoning

[8] The applicants argued that the treatment of the GDR's lethal force border policy as murder was not foreseeable. First, they argued that East German and international law justified or contained exceptions that permitted the use of lethal force at the border. Second, the applicants argued that such actions had never led to prosecution in East Germany (under East German or international law).

[9] First, the Court concluded that in the cases for which the applicants were convicted they could not have availed themselves of the legal justification that existed under East German law. The Court found that the relevant provisions of the East German border policy justified the use of a firearm only for "serious crimes", which, by the terms of East German law, included an illegal border crossing that endangered human life or health, involved the use of firearms or dangerous methods, was committed with a particular intensity or was committed with other people. The Court noted that the cases for which the applicants were convicted did not involve any of these elements as the victims acted alone, were unarmed and employed primitive methods in their efforts to flee East Germany. The Court concluded that it was unimportant that none of the post-unification German courts to consider the cases had relied on this reasoning. The Court satisfied itself that the result reached by the post-unification German courts (that the convictions did not constitute a violation of Article 7 § 1 of the European Convention on Human Rights) was, in fact, compatible with the Convention, regardless of the path taken in reaching that conclusion.

[10] Second, even though it was the practice in East Germany to accept (and not criminalize) the use of lethal force at the border, the Court concluded that the applicants could not claim that the post-unification prosecution for the lethal use of force at the border was not foreseeable. The Court found that East Germany's failure to prosecute such actions was not the expression of a controlling interpretation of the law but, instead, the result of the uniform contravention of East German law. The Court noted that East Germany's failure to prosecute the use of lethal force at the border contradicted the East German constitution, which demanded the respect of life as well as the respect of international obligations which in turn demanded the respect of life. The Court also noted that the failure to prosecute the use of lethal force at the border contradicted Article 95 of the East German constitution, which prohibited the application of a statutory justification in the case of a violation of human rights. Finally, the Court noted that East Germany's failure to prosecute the use of lethal force was largely a result of the power and influence wielded by the applicants, who, the Court explained, superimposed over the liberal and restrained statutory scheme for using force at the border a regime requiring the brutal and excessive use of lethal force at the border through secret orders and supported by ideological training.

[11] Third, the Court dismissed the applicants' claim that the prosecution was not foreseeable under international law, primarily the International Covenant on Civil and Political Rights (which the GDR ratified in 1974). Contrary to the applicants' claims, the Court found that none of the circumstances permitting exceptions to the right to life (Articles 2 and 6) and the right to freedom of movement (Article 12) existed in the cases at issue in these prosecutions.⁽²⁾ The Court found this was especially true in light of the preeminence of the right to life (expressed by the entwined systems of the Universal Declaration and ICCPR).

[12] Finally, the Court dismissed the applicants' claim that the prosecution was not foreseeable because the actions were attributable to the East German state and not the applicants as individuals. The Court found that personal liability for the use of lethal force at the East German border was foreseeable, with respect to the applicants, because the applicants were personally responsible for authoring, promoting and enforcing the "state" policy behind which they now hoped to hide. Significantly, the Court found that key elements of the East German legal system anticipated personal criminal responsibility for violations of the GDR's international legal obligations (like the ICCPR's right to life and right to freedom of movement). The Court suggested that, had personal criminal liability not attached through these other means, international norms for the protection of international human rights (like crimes against humanity) may have required it.

B. Criticism of the Court's Majority Opinion: Elitist, Inconsistent,

Hypocritical and not Compatible with the Nuremberg Precedent

[13] The Court unanimously ruled that the post-unification convictions in these cases did not constitute an *ex post facto* criminal process. The Court was required, in reaching this conclusion, to grasp after and invoke various lines of reasoning: East German law permitted the convictions, international law permitted the convictions, a co-mingled regime of both East German and international law permitted the convictions, Radbruch's formula of "statutory injustice" permitted the convictions, justifications arising under and exceptions to both systems did not apply thereby permitting the convictions. The Court acknowledged that each of the responsible German courts had employed a different line of legal reasoning in upholding the convictions and that no clear line mandated the conclusion reached in the case:

However, as the interpretation and application of domestic law are primarily matters to be assessed by the domestic courts, it is not for the Court to express an opinion on these different approaches, which illustrate the legal complexity of the case. It is sufficient for the Court to satisfy itself that the result reached by the German courts was compatible with the Convention, and specifically with Article 7 § 1.

(*Streletz, et. al.*, 22 March 2001, <<http://hudoc.echr.coe.int>> (p. 31 § 66). This dissonance has its roots in the nagging fact, articulated by Judge Levits in his concurring opinion, that regardless of the manipulations and machinations of Germany's post-unification courts and the European Human Rights Court,

In fact, the courts of the GDR, by applying the same provisions of the GDR Constitution (Articles 19 and 30) and other laws, and also the International Covenant on Civil and Political Rights (Article 12), would never have come to the same result as the German courts did after the reunification and this Court has done in the present judgment because of their completely different approach to interpretation and application of the law.

(*Streletz, et. al.*, 22 March 2001, <<http://hudoc.echr.coe.int>> (Judge Levits Concurring Opinion, p. 47 § 5). This (unassailable) fact grates against (if it does not wholly undermine) the claim that the applicants could have foreseen their convictions. The Court's majority opinion only flirts with this dissonance basing the legitimacy of the post-unification prosecutions on the democratic nature of the post-unification legal order, with its emphasis on and respect for the rule of law. The failure of East Germany to prosecute such actions is, conversely, illegitimate and not determinative of the issue (of foreseeability) because the East German system lacked such democratic foundations. The Court concluded:

... that it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, *cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.* (emphasis added)

(*Streletz, et. al.*, 22 March 2001, <<http://hudoc.echr.coe.int>> (p. 34 § 81).

[14] It is necessary, however, to point out the risk involved in the Court's reasoning while challenging the theoretical legitimacy of the majority's assertion that only law promulgated under a western-style, market democracy merits recognition. The risk of this assertion lies in the fact that it ignores the qualitative difference between the collapse of the Communist empire (leading to these "Berlin Wall Trials") and the unconditional surrender of the National Socialist regime (leading to the Nuremberg Trials). The theoretical weakness of the assertion reveals itself in the historical and the logical inconsistencies that plague the majority's opinion.

[15] The majority opinion does nothing to soften its condemnation of the communist regime. In the same breath, the majority opinion emphasizes the inherent merit, even superiority, of the western model. The former position is necessary. The latter, however, fails to recognize the significance (and likely causes) of the lingering East-West divide in Europe. This divide is not only marked by different living standards in the East and West, but by a nearly tangible disillusionment with the process from both sides of the old divide. The progress towards democratization and the development of civil society, though well under way across the East, is showing clear signs of stalling and even retreat in some areas. A constant but subtle refrain in the discourse is the anger those in the East feel over the conceit with which the West disposed of (or expected the disposal of) valued and valuable institutions in the East. A blanket dismissal of the GDR's authority to make law represents yet another log on the fire of this smoldering discontent.

[16] At the core of this tension lies the radically different circumstances that existed at the end of the Cold War, in comparison with those that existed at the end of WW II. Germany's unconditional surrender to end WW II was followed by allied occupation and at least minimal efforts at de-Nazification and democratic education. In this context there could be no doubt about the Allies' moral and political authority – and their power to enforce it, at the

Nuremberg Trials among others examples. At the end of the Cold War, however, the East was regarded as a partner (though of considerably lesser standing) to German unification. The West did not enjoy the same monopoly on moral and political authority after the Cold War – and its principle power over the East remains the ever less credible power to purchase the East's consent. This ambiguity should disallow total and sweeping condemnations of the former system, certainly not out of admiration for the Communist system but out of respect for the status and heritage of the East as a partner. The Court's dismissive characterization of the East's legal culture makes an altogether different claim, a claim not justified by the circumstances surrounding the end of the Cold War and German reunification.

[17] The posture the Court strikes in its opinion is baldly inconsistent with the approach the West took towards the East throughout the Cold War (the same approach the developed world continues to take towards China). Throughout the Cold War, the West was sufficiently satisfied with the legitimacy of the East's law making power to engage it as an equal in the United Nations, as a creditor and to enter into and abide by international treaties between the two sides. Again, this policy of engagement provides the legacy of the East a legitimacy that Nazi Germany never enjoyed after the Allies' decision to engage in a policy of total war with its end-game objective of unconditional surrender. How, then, is it now possible to completely disregard the East's legal authority? A similar inconsistency works to weaken the specifics of the Court's opinion. The Court found support for its conclusion that the applicants were on notice of the criminality of their actions in a broad range of East German law, including the East German constitution. In fact, the only elements of East German law discredited by the Court's sweeping dismissal of the legitimacy of the East German legal culture are those provisions that would have provided justification for or defenses against the crimes of which the applicants were accused.

[18] It is possible that, beyond the sensitivity required in the real-politik of the post-Cold War era, and beyond the inconsistencies in the Court's reasoning (whether historical or internal to its opinion), the Court's assertion of the inherent superiority of the western democratic model simply over-steps the bounds of democratic theory. If democracy thrives in the competition of ideas (in the market, in elections and through freedom of speech), the Court moves dangerously in the direction of the totalitarian system it seeks to condemn when it makes the claim that only law conceived, applied and interpreted in the western democratic model merits recognition.

[19] A way through these criticisms must have existed. Perhaps it would have required something as visionary and creative as South Africa's Truth and Reconciliation Commission. Perhaps exclusive reliance on international law (in an international tribunal) would have better served the necessity of condemning the atrocities of the former GDR, without eroding the sensitive relationship between eastern and western Germans. Perhaps acknowledging the process as a political act and not a legal act would have been more honest. Instead, the European Court for Human Rights joins the post-unification German courts in a resounding condemnation of the East, when all that was called for was a condemnation of *these* easterners. As the American post – Civil War history reveals, the echoes of such "carpet bagging" can ring far into the future.

For more information:

Decision of the European Court for Human Rights

online: <http://hudoc.echr.coe.int>

(1) On the same day, the Court issued a separate judgement in the related case of a former soldier in the East German army who had also been convicted (intentional homicide) for killing an East German citizen attempting to flee the border into West Germany. (*K.-H.W. v. Germany*, No. 37201/97). The Court, relying on similar reasoning, found no violation of the Convention and affirmed the conviction. For the sake of economy, this report only addresses the Court's judgement in *Steletz, Kessler and Krenz v. Germany*, Nos. 34044/96, 35532/97 and 44801/98.

(2) Article 2 § 2 of the ICCPR permits deviation from the general guarantee of respect for life only when *absolutely necessary*: (1) for the defense of another; (2) to effect an arrest or prevent escape from detention; and (3) to quell a riot. The Court found that lethal force could not be characterized as "absolutely necessary" in the border cases at issue in these prosecutions. Article 2 § 2 of Protocol Number 4 to Article 12 § 3 of the ICCPR permits limitations on the freedom of movement when such restrictions are provided by law and necessary to: (1) protect national security; (2) maintain or restore public order; (3) promote public health and morals; or (4) to ensure the rights of others.