

Chapter I: Transitional Justice, 3 Case Studies

The recent re-unification of Germany and the trial of three former East German border guards provides an interesting starting point to investigate the challenges courts find in addressing questionable, but formerly legal, actions of a defeated regime's forces. The Republic of Germany attempted to avoid the difficulties inherent in transitional justice by completely avoiding the issue of applying *ex post facto* laws. The court attempted to decide the innocence or guilt of the three suspects based entirely upon the laws of the former East German government. The subject of whether there exists a universally binding law, which one should have known even if one's government made legal its transgression, was mentioned only after the verdict was determined.

The fall of the Berlin wall resulted from the economic collapse of the East German state and not from open warfare, but the actions of this failed regime's citizens came under the scrutiny of the re-unified Germany's courts. The new nation attempted to address matters of justice for the victims of the former state's abuses of power. The East German government was a totalitarian state, which actively attempted to control the members of its society through the use of a massive police force and a large internal covert surveillance organization. By August of 1961, the East German Government had erected a barrier between East and West Berlin, as well as East and West Germany, in order to prevent its citizens from fleeing the country into West Germany or other non-communist block countries.

The Communist and Capitalist block nations were waging an ideological war against one another, which helped to instigate the rise of the Berlin Wall. However, for the purposes of law, the erection of a barricade along a nation's border may be viewed as

an issue of national security. The protection of international borders is a well-accepted national right, as well as the protection of a nation's internal economic well-being. The exodus of East German citizens during the beginning of the cold war posed a threat to East Germany's national security on two distinct levels. If this country's most educated individuals fled, their economic power would be severely compromised by losing the international competitive edge in technology, medicine, commerce, and many other important fields. Its post-war re-industrialization efforts would also be severely compromised by losing a majority of its menial work force, if it could not stop the hemorrhaging of its human capital. Additionally, due to the ideological war and the fear of open warfare developing upon East Germany's Western borders, the nation needed to keep a large population for defense.

The internationally recognized sovereign nation of the German Democratic Republic (East Germany) created laws making it illegal for any of its citizens to cross its borders without authorization to do so. Additionally, the East German Government created laws authorizing border guards to use firearms to stop its citizens from illegally exiting its territory; the use of deadly force for attempting to emigrate without permission was clearly legalized.¹ Barricades of razor wire, barbed wire, chained link fence and block walls were erected, as well as areas mined with high explosives. It could be argued that this was all done in an effort to prevent illegal emigration from East Germany in order to uphold its economic and military security. These laws and barricades effectively made East Germany into one massive prison.

¹ Adams, David, ed. Philosophical Problems in the Law. Berlin State Court, Docket No. (523) 2 Js 48/90 (9/91). Belmont: Wadsworth, 2000. 21. "According to [the] Border Protection Act, the use of firearms while on Border Guard duty was justified if it served the purpose of preventing the immediately impending execution or continuation of a criminal act which, according to the circumstances, looked like a crime or for the apprehension of persons who were compellingly suspected of a crime."

The ethical and international concerns over the civil liberties granted, or not granted, as in the case of the German Democratic Republic is not at issue here. What is at issue is whether a sovereign nation has the legitimate authority to make legal the use of deadly force for the commission of what would appear to be a minor infraction within the Western community, namely the attempted fleeing of East German territory. Shortly after the fall of the Berlin wall, this question arose with the re-unification of East and West Germany into the Republic of Germany.

On February 5th, 1989 Chris Gueffroy was shot and killed while attempting to flee East German territory with another East German citizen. Sadly, he holds the distinction of being the last individual killed by East German Border Guards before his nation's collapse. After the re-unification, the question arose whether the homicide of Chris Gueffroy was justified or criminal. The three East German border guards who participated in the shooting were tried for their actions due to public outrage over the incident. The laws of the Federal Republic of Germany dictated that the former German Democratic Republic's laws would measure the defendants' action. The Court ruled that the defendants' actions were in violation of East German laws, specifically that the border guards failed to attempt to spare the victim's life as detailed in the Border Protection Act.² However, this decision was not decided solely by the laws governing border guard conduct, but instead by using the East German constitution to determine what constitutes an adequate attempt to spare a suspect's life. The constitution

² Adams. Law. 21. "Unlawful border crossing . . . was to be classified as a serious crime only in serious cases . . . In the case at hand, according to GDR [German Democratic Republic] law, there was a serious case of attempted border crossing because the act was committed together with others . . . and because the act was accomplished along with the use of dangerous means or methods, that is to say, with the use of the grappling hook . . . firing was permitted in all these cases; just as to how this was to be done, the [GDR] law only says: "The life of persons is to be spared to the extent possible."

guaranteed East German citizens the “protection of life, physical integrity, and health” and from this the court reasoned that this should be the guiding principle as to the extent the guards should have attempted to spare Gueffroy’s life.³ The sanctity of life was to be valued higher than the regulation to stop an illegal border crossing.

The court ruled the homicide as unjustified based upon the constitution’s guarantees for its citizens’ basic human rights, which would make the taking of a citizen’s life by border guards justifiable only in the most extreme and rare occasion. However, the court went a step further by making reference to precedence in international law. Specifically, the court stated that a nation’s sovereignty is not unlimited, but instead bound by the general international moral consensus.⁴ The court alluded to some type of universal law without actually stating that one existed beyond mere fortuitous international moral agreement. The precedence in transitional justice set by the Nuremberg trials was cited as the historical international agreement that a sovereign nation could not make right immoral actions through the use of mere legislation.⁵

This case is intriguing because of its attempt to avoid the issue of universal laws, but at the same time realizing that universal laws must be cited in order to avoid the verdict from collapsing into a case of the politically motivated application of ex post facto laws. The verdict of Gueffroy’s homicide being unjustified cannot possibly stand

³ Adams. Law. 21.

⁴ Adams. Law. 22. “The freedom of a state to determine, for its area, what is lawful and what is unlawful, no matter how widely it is determined, however, is not unlimited. In the consciousness of all civilized nations, with all of their differences revealed by the various national bodies of law which, according to general legal concepts, must not be violated by any law and by any other sovereign power State measure. It encompasses certain basic principles in human behavior that are considered untouchable and that have taken shape with the passage of time among all cultured nations on the basic fertile ground of coincident basic moral views and which are considered to be legally binding, regardless of whether individual regulations in national bodies of law seem to allow that they be disregarded.”

⁵ Adams. Law. 22.

alone without the aid of going outside East German law and appealing to some form of universal law. In order to demonstrate this one need only look to the United States.

The constitution of the United States of America guarantees its citizens that no one shall be “deprived [of one’s] life . . . without due process of law.”⁶ Yet, the California Department of Corrections’ guards have been authorized, through state legislation, to use firearms in order to stop the escape of any prisoner. In fact, signs are posted to warn prisoners that no warning shots will be fired. Furthermore, in the State of California, peace officer standards and training teaches officers to shoot for the center of mass, the largest target available on the human body. This targeting of a person’s chest cavity insures that a suspect will be stopped from engaging in his or her illegal activity. Due to a majority of an individual’s major internal organs being located in the chest cavity, death is a great possibility. Granted, all prisoners have been legally convicted for their offenses, but the additional charge of attempted escape has no due process of law associated with it at the time of shooting. This coercive force may be viewed as punishment, because attempted escape is a legally proscribed action with an attached retributive governmental action that resends the constitutional right to life. Of course, one could argue public safety is at stake and the escape of a multiple murder convict presents a rare and dangerous situation, which must be stopped at all costs. However, the California Department of Corrections houses more than convicted murderers. The California Penal Code lists the second or multiple convictions of petty theft as a felony to be punished by imprisonment in a State Prison.⁷ An individual may simply have stolen groceries from a convenience store and been convicted for a third time. This same

⁶ The Constitution of the United States, Article V.

⁷ California P.C. 666.

individual may be serving a mere two year sentence at the time of his attempted escape, but no distinction is made between a murderer, car thief, or multiply convicted petty thief in State Prison. This individual may be legally shot, because the threat to public safety is deemed too great of a risk to allow any State prisoner to escape. Any individual abreast of legal issues in the United States will know that this is an accepted and Constitutionally approved law, per Supreme Court ruling.⁸

In a society such as East Germany's, a law had been made, citizens had been made aware of this law, and signs were posted within the border to warn individuals that they would be shot for attempting to escape. In no way am I justifying East German legislation, or even the culturally influenced border guard's actions. I am merely pointing out that an attempt to use a former nation's laws against its own laws in order to avoid issues of ex post facto justice is not just. For one, the culture itself must be taken into account in order to see what values were placed on certain offenses and on the rights granted to its citizens. Obviously, East Germany did not construct such an enormous barrier around its territory or invest so heavily in an internal surveillance organization, if it did not value its national security more than the individual rights of its citizens. Furthermore, most societies' constitutions guarantee of certain rights is conditional. In the case of East Germany, or even the United States, the right to life is a conditional guarantee that may be voided depending upon the value placed upon specific laws by the sovereign. This necessitates a court dealing in matters of transitional justice to appeal to universal laws in order to justify the use of ex post facto legislation. Universal law

⁸ Tennessee Versus Garner, 471US1, 1985. The courts ruled that peace officers may only shoot a fleeing felon when the suspect is a considered to be "dangerous person," has been deemed to have committed a "significant forcible and atrocious felony," in order to "prevent a riot," or the shooting is done to "lawfully preserve and protect" the public's peace.

allows a culture's practices, values, and beliefs to become legally void and null when deciding between guilt and innocence. Justice is allowed to transcend the social historical conditions of any given time by its ability to legally demonstrate one should have known better. However, this is not to say that one's social and historical environment may not be used as mitigating factors when determining fair and just punishment.

At the time of the East German border guard trials, almost a half century had passed since the Nuremberg trials. Yet, the legal controversies involved with the trial and punishment of the Nazis still haunts international tribunals. The legal issues that came to light after World War II simply amounted to how could a court legally justify punishing individuals for committing actions that were legal at the time of their commission? Pragmatically, the repercussions of applying new punitive laws to past actions can be very destructive to any society. For instance, if speaking out against the foreign policies of the United States can be declared retroactively illegal in the future, one's freedom of speech is already limited for fear of some possible future punishment. Ex post facto legislation in essence makes a government's power "absolute and arbitrary."⁹ Adding the belief that a group of people has the right to guide themselves through the empowerment of their own sovereign self-determination further complicates the issue of ex post facto legislation.

Another issue involved in transitional justice is determining what actions are merely repulsive to a given culture or what is truly universally forbidden and should be punished. Appealing to simple morality or the cultural norms of the conquering nation

⁹ Adams. Law. 33, Wyzanski, Charles. "Nuremberg: A Fair Trial?"

alone does not necessarily insure justice. For instance, the common morality of the United States at the time of World War II viewed homosexuality as an abhorrently immoral life-style. If among Germany's many immoral actions made legal had the marriage of same sex partners been made legal, should those who had performed these marriages been tried at Nuremberg also? Of course, the actions committed by the Nazi's were severe and horrendous, but much more than the holocaust was at issue. After all, the systematic killing of any individual based solely upon their heritage, religion, or sexual orientation seems to be self-evidently wrong no matter what law makes it permissible. Within German culture and Western Civilization there already existed a prohibition against such actions, which could be reasonably appealed to. Additionally, treaties were in existence well before the rise of the Nazi Regime within Germany, which agreed, "family honor and rights, the lives of persons, and private property, as well as religious conviction and practice, must be respected."¹⁰

Germany had enough internal laws against murder and other grievous offenses committed against its minority groups that it could be argued the Nuremberg proceedings were simply the enforcement of laws already in existence at the time of the offenses.¹¹ This would avoid ex post facto legislation in much the same way that congress may pass legislation making certain actions legal, but still illegal and punishable by transgressing the basic accepted tenets of the constitution. However, this is always a dangerous course, because certain legal documents may be taken out of the context of the whole system. For instance, although the United States constitution guarantees certain rights to all of its citizens, history has shown that what constitutes a citizen may vary widely from

¹⁰ Adams. Law. 31, Wyzanski, Charles. "Nuremberg: A Fair Trial?"

¹¹ Adams. Law. 33, Wyzanski, Charles. "Nuremberg: A Fair Trial?"

generation to generation. Slavery and the lack of equal rights for women provide a perfect example of how the ideals, which are framed by grand words, may not translate into another culture or time. The issue of ex post facto legislation is not so easily escaped.

For the purposes of this work, the main difficulties surrounding the Nuremberg trials arise from the counts, which dealt with entirely new laws, making an individual responsible for carrying out the orders of her sovereign nation, which was engaging in a war of aggression. All previous international agreements and treaties had dealt specifically with a sovereign nation as an entity; in much the same way a corporation is not a person or group of persons, but a legal entity unto itself.¹² Another difficult factor is determining what the exact definition of a war of aggression actually is. A defensive war seems to be a simple enough term; a nation is militarily attacked by an outside force and attempts to defend itself. However, many factors may go into what is considered a provocation for a war laying somewhere between military defense and pure aggression. Was the United States' threatened embargo of oil and steel enough of a provocation to allow the resource dependent nation of Japan to begin a war in order to exert its sovereignty against Western domination? Was the United States' westward expansion a war of aggression? Living space and natural resources in order for a nation's people to flourish have been claimed by most nations as acceptable reasons to wage war. The United States and Britain still engaged in maintaining their control of their own domains of influence during the years preceding World War II, which would seem to suggest that to the victor go the spoils and the right to define justice.

¹² Adams. Law. 34, Wyzanski, Charles. "Nuremberg: A Fair Trial?"

If international law is based upon the actions and norms of all civilized and cultured nations, then the Nuremberg trials were a gross example of absolute and arbitrary power. Of course, I agree wholeheartedly with Justice Robert H. Jackson who unequivocally pointed to the fact that the Nazis committed gross and intolerable actions in the course of their plans to make another thousand-year empire.¹³ However, the difficulties arise when the authority to try individuals for any crimes rests solely upon often ambiguous treaties, which lack specific details of who may be punished and how punishment will be carried out. There seems to be a huge qualitative difference between a treaty and international agreement, which is often based upon political necessities, and a law, which attempts to conform to ethical standards. Additionally and possibly more damning, basing new punitive laws on evolving custom seems highly arbitrary at best.¹⁴ There existed treaties, international agreements, and customs dictating the return of escaped slaves to the nations of their enslavement. The international community has become enlightened enough to realize these customs of the ‘civilized’ world were inherently immoral, and universally illegal. Many slaves were subjected to internationally enforced punishment for mutiny and rebellion in their attempts to gain their freedom. Without a more sound appeal to a type of universal law, international justice will continue to be a series of mistakes based upon customs and culture alone. Universal authority is needed to avoid these mistakes and to justly punish the unjust.

¹³ Adams. Law. 24, Jackson, R. H. “Opening Address for the United States, Nuremberg Trials.” “[The Nazis] represent sinister influence that will lurk in the world long after their bodies have returned to dust. They are living symbols of racial hatreds, or terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and militarisms, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, crushing its manhood, and impoverishing its life.”

¹⁴ Adams. Law. 30, Jackson, R. H. “Opening Address for the United States, Nuremberg Trials.” “It is true, of course, that we have judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs.”

This need for a universal authority is not merely a need for the construction of internationally promulgated law, because agreement does not insure right. The need is for a foundational authority that grounds all promulgated law beyond the reach of corruption, or social and historical circumstances. However, finding this universal authority is wrought with dangers due to humanity's often limited and narrow perspective.

Within this debate and search for universal laws to ground justice, there exists a great worry over cultural colonization and annihilation. For instance, should the international community pursue Taliban officials and citizens who enforced a strict version of Islamic law? The penalty for marital infidelity was death. Many were killed by the state for this and relatively much less offenses. Women were beaten for not wearing their burkhas, as well as both men and women for listening to non-religious music. Should an international tribunal address these actions by state officials? Or, should a sovereign state be allowed to determine what actions are illegal and to what extent commissions of these actions should be punished? The Taliban may seem like a straw man argument for the application of universal laws, but what of China's restrictions on religion, speech, and social gatherings? Does the international community have the legitimate authority to dictate to China how it should legislate its penal codes? How far can cultural differences defend actions of a sovereign state or influence claims against universal laws?

Feminists worry about liberalism's tendency to allow certain abuses of human rights and dignity to continue, because cultural differences are offered as defenses against supposed absolute universal laws. Certain groups practice clitoridectomies, the

circumcision of females, claiming that within their cultures and religions this is as sacred and common as male circumcision in Judaism.¹⁵ This defense has been accepted at times, but unlike male circumcision, female circumcision, by removing the female sensual sex organ, makes it impossible for a woman to achieve orgasm. The sexual act, on the female's part, becomes one for reproduction or mere male gratification. Although this practice is often of a traditional and religious nature, it can be successfully argued that its only purpose is to insure the fidelity of women within a society by eliminating pleasure from the actual sex act.

Although the thrust of many feminist worries over the allowance of abuses to continue in the name of cultural self-identity is a concern over intra-national laws within liberal societies, it is clear that this danger is of equal importance at the international level. The importance of this seemingly tangential issue is that many sovereign nations contain legalized practices related to religion and tradition. Some of these traditions seem inherently wrong, but how does one objectively decide what is allowable for a group to practice and what actions must be brought before the international community in order to be stopped and or punished? These issues leave the arena of mere philosophical mind games and become real when one considers the growing trend toward globalization within the current political arena. Powerful nations are becoming ever more active within less powerful nations' sovereign affairs. Whether, the interjection of outside influences is brought on by war, or simple political interests, the question of attempting to be just and fair to a group of people, while at the same time preventing abuses of some universal law, becomes of paramount importance. Of course, nations can simply rely on might and

¹⁵ Okin, Susan. Is Multiculturalism Bad for Women? New Jersey: Princeton, 1999. 14.

enforce their will, but this often breeds hostility, which leads to violence. If terrorism has taught the powerful anything, it is that even the seemingly weak and backward can and will destroy and kill on a grand scale.

Setting aside all pragmatic concerns, the search for a true universal law devoid of cultural colonizing influences is of supreme importance for its own sake. Humanity is full of great evil, but it is also full of great hope and good. Great powers have often argued for an authority in order to defend their actions. This almost inherent human need for certainty in one's own actions seems to demand that if one claims to be just, then she should actually be just without thoughts of simple pragmatic concerns for consistency and honesty.

Regardless of why one should search for a universal law to punish the unjust, there is a clear need for an indisputable legal authority within the international arena. Wars will continue and human evil will be created anew, but the transgressors of such a universal law would not be able to raise a defense of ignorance based upon a sovereign nation making the illegal legal. Nor would the international community be able to honestly and or ignorantly divide along political lines in matters of justice, if wrong is found to be forever wrong. Complaints of the injustice of ex post facto justice will be forever silenced by the power of absolute just law.

