Former East German Leaders Take Their Criminal Convictions to the European Court of Human Rights.

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[1] On 8 November 2000 the Grand Chamber of the European Court of Human Rights (ECHR) declared admissible the applications in the cases of Kessler, Streletz, K.-H. W. and Krenz against Germany. Three of the applicants were senior officials of the former German Democratic Republic (East Germany), namely Fritz Streletz (Deputy Minister of Defense), Heinz Kessler (Minister of Defense) and Egon Krenz (President of the State Council). K.-H. W. was a soldier in the East Germany army who was stationed on the border between the two German states. After German reunification, including the reunification of the legal systems under the law of the former West Germany, the German courts convicted the applicants Streletz, Kessler and Krenz to terms of imprisonment of five-and-a-half years, seven-and-a-half years and six- and-a-half years respectively for incitement to commit intentional homicide. The three state officials were tried under East German law under the theory that their participation in decisions of the National Defense Council or the Politbüro, which had laid down the regime for the policing of the former GDR's border, made them criminally responsible for the deaths of a number of people who had tried to flee the GDR across the border between 1971 and 1989. The soldier K.-H. W. was given a suspended sentence of one year and ten months' imprisonment for intentional homicide, having been found responsible for the fatal shooting of a person who had tried to escape across the border in 1972. The Federal Court of Justice upheld the sentences and the Federal Constitutional Court declared them to be compatible with the Constitution.

[2] In their submissions to the Court the applicants argued in particular that at the material time their conduct was not punishable under the law of the former GDR or under international law, and that their subsequent conviction by the German courts had therefore contravened the prohibition of the retrospective application of the criminal law enshrined in Article 7 § 1 of the European Convention on Human Rights. Article 7 § 1 reads: "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense 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 offense was committed."

[3] The applicants argue that East German criminal provisions under which they were tried did not anticipate that their actions (allegedly taken in defense of and in the interest of the security of the state of East Germany) would be the subject of criminal prosecution under East German law. That the literal terms of the East German criminal provisions can be applied to the applicants' actions is demonstrated by the resulting convictions. But even if exclusionary meaning is attributed to the provisions' failure to specifically address these "state" acts, the applicants' case faces a difficult road through: (1) the relatively permissive interpretation given Article 7 § 1 by the ECHR and its former co-operating authority with respect to the Human Rights Convention, the Human Rights Commission; and (2) the possibility that Article 7 § 2 provides an applicable exception to the protection against retroactive application of criminal law.

[4] Article 7 § 1 has been interpreted to permit a broad range of sources to serve as the foundation for the scope and meaning of criminal law. Interpretive case law of a domestic high court has been found to sufficiently give notice of the meaning and scope of criminal provisions. (Application 4161/69, X. v. *Austria*, Yearbook XIII (1970)). Similarly, customary law can also serve to define the parameters of a criminal provision, provided that the law is adequately accessible to the affected citizens. (Application 8710/79, *X Ltd. And Y. v. United Kingdom*, D&R 28 (1982)). In light of the fact that the East German government put its domestic criminal law to use in the practice of political persecution, it is possible that there exists adequate common or customary law to render the criminal charges in the applicants' case acceptable under Article 7 § 1.

[5] Article 7 § 2 provides an exception to the first section's general prohibition against retroactive punishment in those cases where punishment is sought "for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations." This provision was a direct response to the desire in Western Europe to criminalize and punish all the atrocities and treasons committed during WWII even though some defied categorization under existing criminal codes. Article 7 § 2 seems to codify the principles established at the Nuremberg and Tokyo proceedings. As a victor taking judicial review of the "abuses" of its former opponent, Germany's judgment of the former East German leadership would seem to at least comport with this history and thus imply the relevance of Article 7 § 2 to the applicants' cases.

For more information:
The web address of the European Court of Human Rights with case law and press information:
http://www.echr.coe.int/eng">www.echr.coe.int/eng

The FCC's East German Border case on the web:
http://www.uni-wuerzburg.de">www.uni-wuerzburg.de

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