Retrospective Justice or Retroactive Standards? Human Rights as a Sword in the East German Leaders Case

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The political transformations of the last two decades—the fall of dictatorial regimes of various ideological stripes, the resolution of long-running internal armed conflicts, the rise to global predominance of liberal-democratic political values, and the decline of the principle of state sovereignty (which had attributed to the state the ultimate word on public order in a given territory at a given time)—have prompted new efforts, both within states and within the international system, to hold individuals personally accountable for violent acts that they committed under the
putative authority of their state. One aspect of these efforts is the growing phenomenon of retrospective and extraterritorial criminal prosecutions—that is, prosecutions carried out by a legal order other than that in effect at the time and place of the acts in question. These prosecutions may be carried out in a new post-transition legal system of the country within which the acts took place, in a foreign legal system exercising extraterritorial (including universal) jurisdiction, or in an international (or mixed) tribunal.

From one perspective, such prosecutions are the closest that a legal and political endeavor can come to representing moral clarity: a struggle to establish the supremacy of humane values over tyranny and terror. These prosecutions are undertaken both to impose judgment on perpetrators of past deprivations of human dignity (the “settling of accounts”) and to reinforce a systemic commitment, at both the national and international levels, to future adherence to human rights standards (the vow of “never again”). Their pursuit is thus perceived consistently to hold the moral high ground, as against formalistic legal obstacles and expedient political compromises that have the effect of perpetuating “impunity.” Such a view ascribes to the legal scholar a primary mission to find ways of expanding the scope of international criminal justice; fixing the limits of that expansion appears as a low priority, if not a kind of mischief.

From another perspective, however, retrospective and extraterritorial prosecutions are, by their nature, fraught with moral, legal, and practical ambiguity. To the extent that they target, not merely the gratuitous cruelties of armed thugs, but ruthless acts animated by the hopes and fears of broader constituencies, such prosecutions test a number of boundaries: between impartially enforcing universal standards and pillorying politically

1. There is a vast recent literature covering such efforts, under the rubric of “transitional justice.” For some overviews of the issues, see generally MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998); RECREATING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER (David Dyzenhaus, ed., 1999); TINA ROSENBERG, THE HAUNTED LAND: FACING EUROPE’S GHOSTS AFTER COMMUNISM (1995); RUTI TEITEL, TRANSITIONAL JUSTICE (1999); TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (James McAdams, ed., 1997).

2. Other aspects of transitional justice include, as alternatives or complements to criminal prosecution, devices such as “truth and reconciliation commissions,” reparation programs, civil damage suits, and “lustration” of complicit officials from the state apparatus.

disfavored causes; between observing legal constraints and insisting on “material justice”; between reaffirming the dignity of a conflict’s victims and humiliating the partisans of the losing side; between establishing a foundation for future voluntary cooperation and coercing a renunciation of deeply-held commitments; between righteously upholding the norms of an international order and officiously meddling in another community’s internal affairs. From this perspective, moral judgments about inhumane acts must yield in some measure to moral considerations of a different nature, such as a commitment to structures and processes designed to cope with the persistence of moral dissensus in a complex and conflict-prone world. On this account—from which the present article proceeds—establishing limits to retrospective and extraterritorial criminal prosecution is indispensable to the legitimacy of the enterprise.

The clash of perspectives on retrospective and extraterritorial criminal justice is frequently obscured by the uncontroversially-monstrous nature of the most familiar targets of such prosecutions. Even in the more restrictive view, many of the recent developments in international criminal law properly reflect the limits of the global order’s pluralism. There can be little objection, in principle, to the prosecution of genocide, crimes against humanity, and gross and systematic violations of the laws and customs of war. Such crimes, properly delimited, cannot be rationalized as “exceptional” means to plausibly legitimate ends, as they, by their nature, embody ends that have been repudiated by the international community as a whole. Although global enforcement plainly falls far short of the legal ideal of treating like cases alike, this shortcoming alone seems insubstantial, so long as the elements of the offenses reflect broadly-acknowledged standards, and so long as due process is observed in adducing proof of individual responsibility.

Nonetheless, the breadth of the emerging licenses for the unilateral implementation of supposedly universal norms, and of the rhetoric of the drive against impunity more generally, necessitates looking beyond the most outrageous and clear-cut instances of international crime. While genocide, crimes against humanity, and gross and systematic violations of the laws and customs of war are beyond the bounds of what any sector of the international community can publicly adopt and rationalize, less spectacular forms of ruthlessness are endemic to real-world political conflict, and are often defended by respected figures as necessary measures. Because

4. Note the shocking recent comments of Benny Morris, the (up to now) widely-admired Israeli chronicler of acts of “ethnic cleansing” (his term for it) during the 1948 Arab-
ruthless measures are directed against threats to what a particular project of public order characterizes as a nation’s vital interests, the criminality vel non of those measures is frequently open to partisan assessment. Indeed, even the gravest established categories of crime, if loosely or tendentiously construed, can be invoked to condemn participants on either side of most armed conflicts.

Israeli war:

I don’t think that the expulsions were war crimes. You can’t make an omelette without breaking eggs. You have to dirty your hands . . . . When the choice is between destroying or being destroyed, it’s better to destroy . . . . We are the greater victims in the course of history and we are also the greater potential victim. Ari Shavit, Survival of the Fittest, HA'ARETZ, Jan. 9, 2004, available at www.haaretz.com (accessed from homepage by selecting Archives) (last visited Feb. 10, 2004).

5. Robert S. McNamara has recently reminded us of grisly Allied measures in World War II that decent liberal-democratic states (and their populations) have never repudiated:

We burned to death 100,000 Japanese civilians in Tokyo—men, women, and children . . . . [Air Force Gen. Curtis] Lemay said, “[i]f we’d lost the war, we’d all have been prosecuted as war criminals.” And I think he’s right. He—and I’d say I—were behaving as war criminals . . . . What makes it immoral if you lose, and not immoral if you win?


6. For an illustration of such a tendentious construction by a member of the European Court of Human Rights, see the concurring opinion of Judge Loucaides in Streletz, Kessler, and Krenz v. Germany, 49 I.L.M. 773 (European Court of Human Rights 2001), in which he deems the Berlin Wall shootings to qualify as a crime against humanity. Cf. Statute of the International Criminal Court, Art. 7, 21 I.L.M. 999 (1998) (a crime against humanity requires a “widespread or systematic attack directed against” a civilian “population”). Even more loosely, the ICCPR Human Rights Committee proclaimed that “production, testing, possession, [and] deployment,” as well as the use, “of nuclear weapons should be prohibited and recognized as crimes against humanity.” Nuclear Weapons and the Right to Life (Art. 6), General Comment 14, U.N. GAOR, 23d Sess. (1994).

7. The private criminal complaints brought in Belgian courts against Israeli Prime Minister Ariel Sharon and Palestinian President Yasir Arafat are not merely illustrative, but potentially archetypical. Whether or not the actions of either or both of these leaders fulfill the elements of established international crimes, the complainants and their supporters are unquestionably seeking to use judicial processes to further partisan agendas—in respect of a conflict that, notwithstanding its high international profile, is very far from among the most violent taking place in the world. For thoughtful misgivings about the application of universal jurisdiction to these and similar cases, see Henry J. Steiner, Three Cheers for Universal Jurisdiction—Or Is It Only Two? 5 THEORETICAL INQUIRIES IN LAW 199, 225-
Broad licenses for retrospective and extraterritorial prosecutions increase the scope for partisan assessments to operate in the name of international legality, at the expense of those individuals unlucky enough to find themselves subject to the jurisdiction of an unfriendly court. At its worst, the transformation of human rights from shield to sword can lead, paradoxically, to violations of human rights.

The 2001 decision of the European Court of Human Rights in *Streletz, Kessler, and Krenz v. Germany,*8 upholding Germany’s post-unification convictions of former East German high officials for the orders they gave to border guards, is a troubling development in this regard. Although nominally upholding the principle of *nullum crimen et nulla poena sine lege,* the European Court effectively licensed holding former officials accountable to a conception of justice at odds with the law applicable at the time and place of their acts. By distorting legality to achieve what it regarded as a human-rights-friendly outcome, the Court reinforced one of the most worrisome aspects of the effort to subject state actors to retrospective and extraterritorial prosecution.

The *Krenz* case is worthy of close examination, not because the defendants (who, after all, ran a harsh dictatorship) have any personal claim to the moral high ground, but because the guardians of human rights themselves need to be guarded. Criminal prosecution, even where undertaken in the name of human rights, is an exercise of immense power, and not only over the lives of the individuals in the dock. The lure of “material justice” is corrosive of the legal accountability on which the preservation of freedom and human dignity ultimately depends. Moreover, an authoritative characterization of adversaries, past and present, as criminals has a wider political significance, undermining structures for future cooperation and compromise with the non-like-minded. The extent to which this risk is worth running for the sake of even a sound imposition of criminal sanctions is debatable. Impositions of the sort upheld in the *Krenz* case, this article will argue, are legally unsound, and should be avoided.

II. EAST GERMAN PUBLIC ORDER IN INTERNATIONAL LEGAL CONTEXT

A legal assessment of acts committed under the authority of the East German state must proceed from an appropriate understanding of the

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normative context of that state’s existence and functioning. From most of
the period leading up to 1989, the community of states was composed of
two ideologically-rival blocs nominally committed to “peaceful coexistence,”
and a third, “Non-Aligned” bloc of emergent (and mostly poorer and
weaker) states seeking to make real the promises of territorial integrity,
political independence, and sovereign equality to which the stronger states,
shopping for allegiance, paid lip service. Accordingly, the international legal
system of the era embodied a collective moral and political vision of
respectful cooperation among states bearing competing conceptions of just
public order. That system’s pluralism, as articulated in the United Nations
Charter and developed through the subsequent interpretive practices of
states and intergovernmental organizations,9 required states to renounce
efforts to impose their own standards of justice within the territory of
foreign states.10

The moral (as opposed to the purely pragmatic) foundation of the
international system’s pluralism was the presumption that states represented
the self-determination of the populations (qua political communities, or
“peoples”) that they territorially encompassed.11 State officials, in turn,

9. Gerry Simpson has recently elaborated a contrast between “Charter liberalism,” the
pluralist vision associated with the Charter, and the “liberal anti-pluralism” of a set of
leading U.S.-based international law scholars (i.e., Thomas M. Franck, Anne-Marie
Slaughter, W. Michael Reisman, and Fernando Tesón). See Simpson, Two Liberalisms, 12

10. As Thomas M. Franck has put it, “nations have favored treating all states as
autonomous entities entitled to be left alone, and doing so on grounds of maintaining
international peace and order, rather than advancing justice.” Thomas M. Franck, Is Justice
Relevant to the International Legal System? 64 NOTRE DAME L. REV. 945, 955 (1989).
Franck drew from such observations, and more generally from the system’s designation of
states rather than individuals as the primary units of analysis, the conclusion that justice is
not “among the indicators of legitimacy” in the international system. Id. at 962. This
conclusion is (or at least was in 1989) correct insofar as the liberal conception, or any
particular substantive conception, of justice is concerned; it is misleading to the extent that
it implies a straightforwardly amoral order.

11. See Declaration on Principles of International Law Concerning Friendly Relations
and Co-operation among States in Accordance with the Charter of the United Nations
[hereinafter Friendly Relations Declaration], G.A. Res. 2625, U.N. GAOR, 25th Sess.,
Supp. No. 28, at 121, 124 UN Doc. A/8028 (1970) (affirming as an imperative “the
territorial integrity [and] political unity of sovereign and independent States conducting
themselves in compliance with the principle of equal rights and self-determination of peoples
... and thus possessed of a government representing the whole people belonging to the
derived their international authority not from their own power and will, but from a presumption that they served as agents of the collectivities that they purported to represent. Yet, notwithstanding the Charter's exhortations regarding "human rights and fundamental freedoms," that presumption was not taken to be rebuttable in accordance with liberal political principles. Rather, internal processes were typically accorded deference, even where those processes offended liberal principles. This deference represented not an abandonment of the moral principle of popular sovereignty, but rather an application of that very principle in the absence of shared assumptions about popular sovereignty's substantive and procedural requisites. The conventional wisdom held that empirical investigation to ascertain public opinion in a foreign state is most often impracticable, that "popular will" itself is a complex and normatively-loaded concept, and that any imposition from abroad of procedures calculated to measure "popular will" is presumptuous at best, and a usurpation at worst.

This wisdom was reinforced by the very nature of the Cold War, which presented itself to the world as not merely a clash of powers, but a clash of universal creeds. Liberal democracy and "people's democracy" represented two complete and opposing conceptions of public order struggling for adherence within all nations. Moreover, the intensity of the struggle allowed for the paradoxical rationalization, on both sides, of dictatorial, repressive, and even terroristic means to "democratic" ends. Expressions of principled outrage at such means could easily be dismissed as—and indeed, frequently amounted to—partisan propaganda.

12. Id.
13. In the words of the Friendly Relations Declaration, supra note 11, "[e]very State has an inalienable right to choose its political, economic, social, and cultural systems, without interference in any form by another State"; "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." Id. at 123. The Declaration's language parallels that of Article 1 of the International Covenant on Civil and Political Rights: "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, GA. Res. 2200A, U.N. GAOR, 3d Comm. 21st Sess., 496th plen. mtg. (1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Art. 1, 6 I.L.M. 360 (1967).
This is not to say that the international order’s pluralism was unbounded. The system resolutely excluded certain deviant governing arrangements: Axis-era fascism from the start, and “alien, colonial, and racist” regimes later on. Nonetheless, it otherwise represented an accommodation among radically differing conceptions of justice. The international legal order combined overlapping consensus with \textit{modus vivendi}, a least-common-denominator morality with a prudential policy of compromise.

Divided Germany symbolized the normative divide between East and West. But while the early years of the Cold War had been marked by dangerous superpower tensions over a divided Berlin, the situation stabilized in the 1960s, not long after East Germany’s 1961 construction of the Berlin Wall to halt the flow of westward emigration. The reality of two German states gradually came to be accepted by the opposing blocs, and in 1973, both were admitted to the United Nations. Although West Germany was never completely reconciled to East Germany’s sovereign status (and continued to confer automatic citizenship on East German arrivals to the West), the international order regarded the sovereign equality of East Germany as a legal fact, terminating only after the 1990 re-unification treaty that followed the fall of the Communist regime.

III. THE LEGAL PRINCIPLE OF NON-RETROACTIVITY

The principle of \textit{nullem crimen et nulla poena sine lege} lies at the very heart of the concept of the rule of law—so much so that it is frequently referred to merely as “the principle of legality.” Few measures contradict the essence of legality so fully as the retroactive criminalization of acts that violated no law applicable at the time and place of their commission. Accordingly, Article 15 of the International Covenant on Civil and Political Rights (ICCPR) demands that, “[n]o one shall be held guilty of...

15. See Friendly Relations Declaration, supra note 11, at 122 (“subjection of peoples to alien subjugation, domination and exploitation” is contrary to the Charter); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 103, U.N. GAOR, 36th Sess., 91st plen. mtg., at 78, 80 (1981) (non-intervention norms shall not “prejudice in any manner the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes . . .”).

16. The contrast between “overlapping consensus” and “modus vivendi” derives from JOHN RAWLS, POLITICAL LIBERALISM 144-50 (1993).

17. See generally ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 139-58 (2003).
any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law [including the general principles of law recognized by the community of nations], at the time when it was committed. Although the absence of international criminal statutes makes inevitable some compromise of the associated principle that the penalty, as well as the crime, be fixed in advance, any compromise of the core principle is problematic.

Some have suggested that the *nullum crimen* principle should be interpreted flexibly in cases of transition from dictatorial to democratic forms of government. The suggestion reduces the principle to rationales unrelated to the circumstances of regime change, such as "the special trust reposed in criminal statutes when these have been enacted by a democratic legislature required to respect fundamental rights," or the need for an existing legal system to guarantee a prospective freedom to act without fear of being unpredictably subjected to punishment. But important as such rationales may be, they are not exhaustive.

Indeed, regime change may be the most important context for the

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18. ICCPR Art. 15(1), 15(2), *supra* note 13; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Art. 7(1), 7(2) (1950) (containing virtually identical language). The reference to "general principles of law" inserted by Art. 15(2) is properly understood not as adding an additional category of crimes, but as an interpretation of the sources of international law consistent with the Statute of the International Court of Justice, Art. 38(1)(c).

19. *See* ICCPR Art. 15 (1), *supra* note 13 ("[n]or shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."). *But see* CASSESE, *supra* note 17, at 157 ("[t]his principle is not applicable at the international level," where statutory sentences do not exist). Although the overall principle of non-retroactivity in criminal law is most frequently referred to in shorthand as "nulla poena," this article will use the term "nullum crimen" to reinforce the emphasis on the prior delimitation of the offenses themselves, rather than of the penalties.

20. The core principle itself, of course, does not demand complete rigidity. In any system of criminal justice, real cases reveal gray areas that call for judicial clarification, and such clarification necessarily entails some retroactivity in the delimitation of offenses. The problem comes, not in bending rules to effectuate their manifest purposes, but in superimposing new purposes at odds with previous understandings.


22. Id. This is a major theme in the work of Lon L. Fuller. *See*, e.g., Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); LON FULLER, *THE MORALITY OF LAW* (rev. ed., Yale Univ. Press 1964).
nullum crimen principle’s application. Exercises of public power are often morally controversial; acts that a regime’s opponents may regard as morally tantamount to criminality may at the same time be regarded by a regime’s supporters as morally permissible, or even imperative. Positive law serves the indispensable function of establishing a provisional resolution of such controversies, so that individuals (officials and non-officials) can know where they stand in the scheme of public order that undergirds, at the given moment, the society’s pursuit of its basic tasks. Even where one can justly criticize these individuals for failing to conform to moral imperatives unreflected in the positive law of the time and place, one cannot justly disregard their reliance on then-prevalent standards. To subject persons to the pillory of criminal prosecution for failing to anticipate the refutation of their government’s moral position—a position that must be presumed to have been held by some critical mass of the population sufficient to maintain the efficacy of the old order, at least for the time being – is to scapegoat individuals for circumstances endemic to the human condition. Such punishment, even where undertaken in the name of an objectively correct conception of human dignity, works its own deprivation of human dignity.

Moreover, even where ex post facto criminal lawmaking is not substantively unfair, it undermines the ethos of legal constraint in the exercise of power. Systems that eschew the rule of law do so in the name of a “material justice” that is best served by unconstrained exertions of discretionary authority.23 The rule-of-law tradition is, by contrast, distrustful of such empowered moralism, however righteous its exertions may appear in a given instance. Juridical rationalization of extralegal measures establishes a principle that, to borrow from Justice Jackson, “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”24 While most observers (this author included) accept the general proposition that all human beings, everywhere and always, are chargeable with knowledge of the existence, validity, and applicability of certain minimum standards of humane conduct, irrespective of the applicable positive law, the potential for fierce disagreement over the application of this proposition in particular contexts (as between, say, those sympathetic to the victorious, and others to the defeated, cause) supports an insistence on fixed standards, at least when trading on the idea of a

distinctively legal form of justice.

None of this is to deny that some moral clashes exceed the scope of those ordinary to the harsh realities of the human condition, and call for extraordinary responses despite the above considerations. But given the developments in international criminal law since Nuremberg, which have established a modicum of consensus on the criteria for clear-cut cases of international crime, it is much harder today than in the past to substantiate a pressing need to breach the *nullum crimen* norm.

The primary significance of *nullum crimen* in the current period is in application, not to the retroactive creation of new crimes, but to the retroactive nullification of defenses. Most violations of the physical integrity of the person presumptively constitute criminal offenses in almost all legal systems, and therefore presumptively count as "criminal according to the general principles of law recognized by the community of nations" under ICCPR Article 15(2). These "universal" presumptions in no way amount, however, to a universal conception of criminality, given the absence of a legal consensus on which presumptive violations may count as a legitimate and proportionate means to a compelling end. Where the act in question fell within a justification or prerogative recognized by the legal system then and there in force, the act squarely "did not constitute a criminal offence under national... law," irrespective of any general prohibition that would otherwise pertain. The legal system's recognition of the defense may be express, or it may be manifested in patterns of practice that reflect a prevailing interpretation of written enactments.

IV. RETROACTIVE STANDARDS IN THE EAST GERMAN LEADERS CASE

In its 2001 *Krenz* decision, the European Court of Human Rights grappled with the *nullum crimen* principle in reviewing the post-unification


26. *Id.* at Art. 15(1). Retroactive nullification of defenses, while always problematic, is less so where the defense pertains merely to the mitigation of the defendant's responsibility for having committed a concededly unjustified act. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1349 n.124 (1989) (defenses based on the doctrine of excuse, while sheltering the actor from blame on ground of diminished agency, concede that the act itself was unjustifiable and ought not to have been done).

criminal convictions in the Federal Republic of Germany (FRG) of former
German Democratic Republic (GDR) leader Egon Krenz and other former
GDR officials. These officials had issued orders concerning the use of
deadly force against "border violators"—East German nationals who sought
to flee the GDR over the Berlin Wall or across the inter-German border.28
The officials were convicted of incitement to commit intentional homicide
(a crime that, unsurprisingly, existed under GDR law), in disregard of
defenses based on the established anti-emigration policies of the East
German state.29 The case raises an important set of questions about what
constitutes retroactive nullification of a defense, and when, if ever, such
nullification is consistent with human rights and the rule of law.

In the several FRG courts that had considered the issues prior to the
defendants' application to the European Court of Human Rights, three
distinct lines of argument emerged in support of the convictions. The first
line of argument—the one upheld by the Court—asserted that GDR law
itself, interpreted properly according to its terms rather than as skewed by
the regime's political domination of legal institutions, condemns the border
enforcement orders as criminal acts. The second line of argument, operating
both independently of and in conjunction with the first, was that the GDR's
obligations as a party to the International Covenant on Civil and Political
Rights and under customary international human rights law precluded any
legal justification for the enforcement orders. The third line of argument,
invoking the post-World War II jurisprudence of Gustav Radbruch, asserted
that, to the extent that the positive law of the GDR furnished a justification
of the enforcement orders, such law should be "disapplied" as "intolerably
inconsistent with justice."30

All three of these arguments merit close scrutiny, for they are
archetypical. All three invoke ideas that could justify, in the right
circumstances, sustaining a conviction of high officials of a human-rights-
violating state. All three, however, are bad arguments as applied to this

28. Estimates of the death toll over the twenty-eight year period range from the FRG
Government's official estimate of 264 to advocacy group estimates of over 900. Krenz, 49
29. Id.
30. Krenz, 49 I.L.M. 773 at para. 22. For a thoughtful comparison of the jurisprudence
of post-Cold War and post-World War II prosecutions in Germany, including the
invocations of "Radbruch's formula," see Andrew Emanuel Tauber, Tyranny on Trial: The
case, and illustrate the jurisprudential sleights of hand that courts fixated on "ending impunity"—including, ultimately, the European Court of Human Rights—are disposed to commit.

A. Retroactivity through the Reinterpretation of Positive Law

In 1961, in an effort to halt the massive emigration of its nationals to its Western rival—roughly two and a half million since 1949—East Germany built the Berlin Wall and implemented a set of draconian border regulations. In the eyes of the GDR regime's opponents, East and West, these measures symbolized the tyranny and cruelty of the Communist system, and were a focal point of the ideological conflict that marked the Cold War era.

Whatever else may be said of the harshness of these measures, their cruelty was not gratuitous. The GDR was faced with a structural predicament that had no straightforward solution: (i) the GDR bordered on the FRG, a more prosperous state that offered GDR nationals automatic citizenship, that posed no cultural or linguistic barriers to entry, and to which many GDR nationals had familial connections; (ii) in addition to being less prosperous, the GDR was committed, as part of its raison d'etre, to obliging its most capable and productive workers (to whom it had provided education and training) to contribute their productivity to its social project for highly limited rewards, thereby intensifying the threat of a debilitating "brain"; (iii) a collapse of the GDR's economic and social project would have led during this period, not to democratization and peaceful reunification with the FRG, but to renewed Soviet occupation and heightened international tensions. The GDR's vital interests manifestly depended on foreclosing its nationals' option to emigrate, and indeed, the anti-emigration measures largely succeeded in stabilizing (albeit arguably at an unsatisfactory level) the economic and social life of the country.

The Krenz case turns on the following order issued by the GDR National Defense Council to border guard units: "The unit . . . will ensure the security of the GDR's State border[;] . . . its duty is not to permit border crossings, to arrest border violators or to annihilate them and to protect the State border at all costs." The border control policy contained significant

ambiguities, as it was embodied in a multiplicity of directives—public and secret, express and implied. There were, in addition, various changes over time, most notably the removal in the 1980s of anti-personnel mines and automatic-fire systems. Nonetheless, the policy’s essential logic was relatively overt and stable: it purported to eschew the “unnecessary” use of deadly force, but included within “necessity” the prevention (“at all costs”) of any unauthorized border crossing. Although some authorizations and uses of deadly force at the border may not truly have constituted the least-drastic available means to the end, FRG courts consistently deemed all of the authorizations and uses of deadly force to have been disproportionate, not for having been unnecessary to the prevention of border crossings, but for having given priority to that goal over the safeguarding of human life.

Can these measures properly be said to have been illegal under GDR law? In analyzing the law of the GDR regime, not only as it operated in practice, but also as it presented itself in principle, one must acknowledge at the outset the distinctive jurisprudence (to put it too kindly, perhaps) of “socialist legality” that governed legal interpretation.

In a liberal-democratic society, legislation represents the democratic outcome of legitimate competition among a plurality of interests and values, and the constitution represents the basic structure of the democratic polity within which that competition proceeds. Both set standards— independent of, and potentially adverse to, executive discretion—that are invoked to hold the executive apparatus to account.

Socialist legality, conversely, recognized no legitimately-competing interests and values, and therefore did not envisage law as a binding accommodation to be imposed as a bridle on executive authority. Rather, both legislation and the constitution were understood as reflections of an essential unity of interests and values—as expressed abstractly in the ideology and concretely in the policies of the ruling party—that legislative, executive, and judicial organs (not “branches”) alike were bound to serve. Law was understood as an instrument of, not a check on, the party’s express purposes (with enactments often incorporating those purposes by reference), and was to be interpreted teleologically in light of those

34. See id. at para. 60.
35. To the extent that secret orders called for uses of deadly force beyond what was needed to prevent border crossings, they can properly said to have contravened the GDR’s espoused legal standards, and their issuers can justly be found criminally liable. What makes the cases jurisprudentially problematic is precisely that they did not turn on such a finding.
purposes. It is frequently objected that this scheme did not represent "legality" at all, and that the GDR was an Unrechtsstaat, a lawless state. That characterization, if apt, would at any rate prove too much for present purposes, for the burden lies with the prosecution to establish that the defendants violated law applicable at the time and place of their acts. A better characterization is that the GDR rejected the concept of "the rule of law," which ascribes to law (i.e., to legal processes and to the culture of legal interpretation) an autonomy from political authority. That rejection is, indeed, the essence of what it means to call the GDR a "dictatorship" (as opposed to another form of authoritarian state). Law has many social functions, including the control of corrupt or renegade public officials, that GDR law purported (though perhaps often failed) to fulfill. Read in context, however, GDR law did not purport to hold the highest levels of officialdom accountable to any legal standard exogenous to the value system of the ruling party.

If one regards the nullum crimen principle as fundamental to the propriety of a criminal conviction, this insight is indispensable. The applicable GDR statutes established a justification for the use of deadly force "to prevent the imminent commission or continuation of an offence which appears in the circumstances to constitute a serious crime."

36. Tauber, supra note 30, at 158. Tauber draws roughly the same conclusion about the nature of GDR law. Id. For an elaboration of "socialist legality," see HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 277-311, 363-84 (rev'd ed., Harvard Univ. Press, 1963); see also Franciszek Przetacznik, The Socialist Conception of Human Rights, 13 REVUE BELGE DU DROIT INTERNATIONAL 238, 246 (1977) ("the Socialist State, as an incarnation of the totality of the working people, coordinates the interests of society and of the individual and creates the conditions indispensable to the formation of unity between the rights and duties of man and citizen"); VENIAMIN CHIRKIN, CONSTITUTIONAL LAW AND POLITICAL INSTITUTIONS 30 (1985) ("in place of the bourgeois individualistic conception of the freedom of the individual, there exists under socialism another [concept of freedom] . . . as inseparably bound up with the unity of the basic interests of society, the state, the collective and the individual."); EVGENI M. CHEKHALIN, THE SOVIET POLITICAL SYSTEM UNDER DEVELOPED SOCIALISM 209-10 (1977) ("political freedoms . . . are exercised in the USSR exclusively in the people's interest" and "may not be used to harm the cause of peace, democracy and socialism.").

though one of the statutory criteria, "committed with particular intensity," arguably describes any deliberate encounter with the overt risks that the border fortifications posed. But the pattern of official (including judicial) practice clearly established the inclusion of border transgression within the authoritative construction of "serious crime." Whatever may be said for the nominal supremacy of the GDR Constitution over legislation and customary practice (Art. 89(2)), the Constitution's affirmations of the rights, dignity, and liberty of the person need to be read through the lens of the overarching ideology and in keeping with the acknowledgment, in Article 1, of the party's leading role. The border policy constituted controlling law from the standpoint of the GDR's legal culture: as the European Court of Human Rights admitted, the policy "was imposed on all organs of the GDR, including its judicial bodies."

On the other hand, if one regards the nullum crimen principle as a formalistic obstacle in the way of an unambiguously desirable outcome, little creativity is required to circumvent the obstacle. East German law's basic language and doctrinal structure resembled those of the liberal West; once emptied of its ideological content and idiosyncratic principles of interpretation (and therefore of its real substance), its enactments provide a ready basis for condemning the very exercises of power that it systematically accepted and affirmed in practice.

This jurisprudential maneuver has been fittingly described as

38. Id. at para. 59. Art. 213(3) of the 1979 GDR Criminal Code defines "serious cases" of illegal border crossing as cases punishable by more than "up to two years." Id. "Serious crimes" are defined more broadly in Article 1(3) to include:

Attacks dangerous to society against the sovereignty of the German Democratic Republic, ... offenses against the German Democratic Republic[,] and deliberately committed life-endangering criminal acts. Likewise considered serious crimes are offenses dangerous to society which are deliberately committed against the rights and interests of citizens, socialist property and other rights and interests of society, which constitute serious violations of socialist legality and which, on that account, are punishable by at least two years' imprisonment.

Id. at para. 35. Given the vagueness and ideologically-loaded nature of these terms, it is far from implausible, even absent the peculiarly teleological interpretive method prevalent in socialist systems, that the language provided a statutory justification of the National Defense Council's order. See Julian Rivers, The Interpretation and Invalidity of Unjust Laws, in Recrafting the Rule of Law: The Limits of Legal Order 47-48 (David Dyzenhaus, ed. 1999).


"reinterpretable positivism": the imputation of an anachronistic liberal spirit to the law of a non-liberal regime. The European Court of Human Rights embraced this approach with alacrity, holding that the FRG courts "cannot be criticised for applying and interpreting the legal provisions in force at the material time in light of the principles governing a State subject to the rule of law."

Such a substitution of interpretive method—attributing to words an "objective" meaning at variance with the meaning that they had in the legal culture in which they were embedded—is incompatible with the nullum crimen principle. No country's legal enactments can be said to have meanings so objective that their terms can be applied without regard to their context and to the overall framework within which they are routinely interpreted. By such a method one could, to take an easy example, readily interpret many clauses of the United States Constitution to condemn generations of established U.S. governmental practice—thereby delivering a great surprise to public officials (and cooperating citizens) who had every reason to believe that their conduct, however much at odds with a hostile outsider's semantic analysis of the Constitution's terms, was legally authorized. Nothing of substance follows from the Court's observation that "anyone could have foreseen that, in the event of a change in regime in the GDR, these acts might constitute criminal offenses"; one might as well have said that FRG officials were on notice that many of their acts would be prosecutable, through a similar process of legal reinterpretation, in the

41. See Tauber, supra note 30, at 28-29.
42. Krenz, 49 I.L.M. 773 at para. 81. The Court continued:
Contrary reasoning would run counter to the very principles on which the system of protection put in place by the [European Convention of Human Rights] is built. The framers of the Convention referred to those principles in the preamble to the Convention when they affirmed "their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend" and declared that they were "like-minded" and had "a common heritage of political traditions, ideals, freedom and the rule of law."

Id. at para. 83. Given that the GDR was never among the "like-minded" states that embarked on this project, this passage illustrates the distortions introduced by the transformation of human rights from a shield into a sword.
event of the East winning the Cold War.\footnote{44}{The Court’s statement reveals an affinity for the FRG legal system’s tendency, more express in the pre-reunification era but continuing tacitly afterward, to deny the sovereignty of the GDR. See Peter E. Quint, \textit{Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command}, 61 REV. OF POLITICS 303, 326-27 (1999). Where a territory is under the \textit{de facto} control of an illegitimate regime, the standard judicial approach is to acknowledge the legal status of public acts routine to territorial administration (under a doctrine known as “implied mandate”), but to deny the legal status of public acts that reflect the distinctive agenda of the illegitimate authority. ROTH, supra note 14, 152-59. This approach suggests that those acting specifically to enforce the Communist order were on notice that upon restoration of legitimate rule, their acts could be construed as crimes on the basis of FRG standards, irrespective of authorization by the illegitimate regime. See Tauber, supra note 30, at 143 (stating that “[a]ccording to the court [in a 1964 prosecution of a border guard who ended up in the West], the East German border regime served no defensible purpose; its sole rationale was the maintenance of communist tyranny.”). Since the GDR’s admission to the United Nations in 1973 established beyond cavil its status as a sovereign entity for the purposes of international law, no residue of this doctrine should be allowed to bolster the prosecution of former GDR officials.}\}

The Court’s misstep has its roots, though, in a valid idea that would have justified the desired outcome in a somewhat different context. The valid idea is that \textit{nullum crimen} is satisfied where officials, who succeeded in establishing a practice of impunity through the exercise of their own raw power, are held to the legal standards that their regime actually purported to observe, and that it thus traded on in its quest for legitimation. If hypocrisy is, as the saying goes, “the tribute that vice pays to virtue,” that tribute properly defeats any claim that the conduct in question had not been established to be vice. Regard for positive law should not be conflated with a cynical realism about what counts as law; positive law is not reducible to whatever the powerful can get away with. Had the GDR officials’ impunity been owing to covert or thuggish measures that had distorted or impeded the implementation of the GDR’s own purported legal standards, it would have been quite proper, after the regime change, to hold those officials to an undistorted version of the applicable standards.

The Court’s fundamental error lay in regarding the characteristic East German mode of legal interpretation as self-consciously immoral or amoral, rather than as an authentic expression of an ideology, with some substantial following, that was in moral disagreement with liberalism. Hypocritical though it was in other respects, the GDR was not a \textit{faux} liberal regime, but an insistently anti-liberal one. It indeed used political and legal rhetoric
reflective of an intellectual heritage held in common with liberal states, but not, in the main, to camouflage the regime’s deviation from liberal legalism. Rather, it attempted, through this rhetoric, to present its distinctive policies as the genuine fulfillment of the same underlying values that liberal states espoused but had, in the Marxist-Leninist view, betrayed. However much cynicism and corruption marked the system in practice, the regime consistently sought legitimation (as “the better Germany”) by appeal to a set of normative principles sharply at variance with those of the West.45

Whatever its other deficits, the East German regime did not lack for moral rationalizations of its basic structure and functioning. Although some policies were kept covert precisely because they defied even the Communist talent for rationalization, this was not so of the most essential aspects of the border control system (though the regime did go to some length to conceal the extent of that system’s human consequences). Moreover, the interpretation of the individual’s legal protections in light of an authoritarian-socialist hierarchy of values was a point of principle, openly announced. One might argue that this brazen stance opens the ex-GDR officials to attack on other grounds, but, however that may be, it is error to condemn them on the basis of an authentic reading of GDR law.

It is, of course, possible to insist that authenticity is beside the point. In his concurrence in the European Court’s Krenz judgment, Judge Levits contended that “there is no room for other solutions” than “to apply the ‘old’ law, set by the previous non-democratic regime, according to the approach to interpretation and application of the law which is inherent in the new democratic political order.”46 In his view, “[u]sing any other method of applying the law . . . would damage the very core of the ordre public of a democratic State.”47

But it is hard to see why this is so in cases where nullification of unjust law operates as a sword rather than as a shield. To be sure, a liberal-democratic system must refuse applications of illiberal legal standards that would deny individuals the benefits of liberal justice. The anachronistic legal interpretation at issue here, however, is precisely what works the denial of liberal justice (at least prima facie) by negating nullum crimen, itself a principle at “the very core of the ordre public of a democratic state.”

45. For an elaboration of the theoretical basis of Marxist-Leninist legal norms, see ROTH, supra note 14, at 75-120.
46. Krenz, 49 I.L.M. 773 para. 7 (Levits, J., concurring).
47. Id. at para. 8 (Levits, J., concurring) (emphasis in original).
there is a danger of eroding that core, it far more plausibly emanates from indulging the retroactive expansion of criminal liability in pursuit of material justice, a quintessential practice of illiberal regimes.

B. Retroactivity through the Direct Application of Unincorporated International Law

An alternative theory underlying the FRG court judgments was that since GDR regulations restricting emigration violated international law, the state's effort to enforce them could provide no justification for the authorization or use of deadly force. This theory is rooted in either of two propositions: (i) that international human rights law by itself operates to nullify defenses recognized by GDR law; or (ii) that international human rights law was incorporated into GDR law so as to eliminate the defenses at issue from the corpus of GDR law. The first embodies a mistaken understanding of the interrelation of international and domestic law, and the second embodies an unjustified conclusion about GDR law's reception of international law.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which the GDR was a party, provides that "the inherent right to life . . . shall be protected by law," and that no one "shall be arbitrarily deprived of his life." Article 12 further provides, inter alia, that:

Everyone shall be free to leave any country, including his own . . . [That right] shall not be subjected 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 other rights recognized in the present Covenant.

Read together, the two Articles can be compellingly construed to condemn the GDR's border enforcement system as a violation of its obligations under


49. ICCPR, supra note 13, Art. 6(1).

50. Id. at 14, Art. 12.
international human rights law. If that were the question posed to the FRG courts or to the European Court of Human Rights, one could scarcely object to it being answered in the affirmative.

But this is precisely not the question at issue. The existence of legal obligations to uphold internationally-recognized human rights does not, ipso facto, affect the legal norms applicable to individual conduct, even conduct undertaken in an official capacity. Except with respect to the limited set of conventions and customary doctrines establishing criminal liability for violations under color of state authority—under mere "color" of that authority because states have renounced not only the practices themselves, but also, expressly or tacitly, the legal capacity to authorize them—international human rights law is binding only on states as corporative entities, and is transformed into directly applicable standards of individual conduct only through the enactments of domestic authorities.

Individual states may choose, through a blanket constitutional or legislative incorporation of treaties and the customary law of nations, to integrate international obligations automatically into directly applicable domestic law, thereby adopting a fully "monist" conception of the relationship between domestic and international law. To the extent that they do not do so, however, the relationship must be presumed to be "dualist," with domestic law operating on a separate plane from international obligations until and unless specific domestic enactments incorporate international legal standards.

Moreover, for states to adopt international obligations does not entail renunciation of the ultimate authority to violate those obligations for the sake of what they deem, unilaterally, to be the national interest, thereby incurring

51. Thus, "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law." Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentence, 41 AM. J. INT'L L. 172, 221 (1947).

52. For example, in the domestic law of the United States, many treaties, such as the United Nations Charter and the International Covenant on Civil and Political Rights, are considered "non-self-executing." They bind the United States on the international plane, but they have no direct effect on internal legal obligations. See, e.g., Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (Cal. 1952) (recognizing that "[a] treaty does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing."); U.S. ICCPR Reservations, Understandings, and Declarations, 138 CONG. REC. S4781 (1992), Decl. 1 (Senate Declaration that the ICCPR's substantive provisions are non-self-executing).
whatever sanctions the international community may duly inflict on the state.53 International obligations do not extinguish sovereign prerogative, just as sovereignty in no way precludes obligations that constrain governance in the ordinary course.54 Even in the classic writings of Bodin and Hobbes, sovereignty entails, not freedom from duties as to character of public order, but a monopoly of the last word on what counts as public order.55 As the neo-Bodinian Carl Schmitt explained, sovereignty does not negate the existence of a legal rule; rather, "[s]overeign is he who decides on the exception."56 "If the individual states no longer have the power to declare the exception, . . . then they no longer enjoy the status of states."57

States are liable for violations of international law, but it does not follow that the violation legally nullifies the offending "act of state." This difference is significant, since individuals are often in the position of acting under a legal regime that violates international law.58 Executive or legislative

53. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 168 (Mineola, N.Y., Foundation Press, 1972) ("International law . . . recognizes the power—though not the right—to break a treaty and abide the international consequences.").

54. One way to explain this phenomenon is to assert that international law remains a creature of sovereign states, rather than vice versa. But even if international law is taken to be the juridical foundation of sovereign prerogative, it does not follow that the protections and immunities conferred on states become legally ineffective whenever states violate their legal obligations. And a good thing, too, for if innocence were a condition of inviolability, strong states would always be able to find justifications for intrusions upon weak states. An instructive illustration is the U.S. invocation of alleged Nicaraguan human rights violations to justify the contra war, a move soundly repudiated by the International Court of Justice. Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. REP. 14, paras. 267-68 (1986). Similarly, no international law violations that may have emanated from the U.S. Embassy in Teheran prior to November 4, 1979 could have licensed Iran's violation of the Embassy's immunities. Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), 1980 I.C.J. REP. 3, paras. 81-87 (1980).

55. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 30 (M.L. Tooley, Basil Blackwell Oxford 1955) (1576) (bk. I, ch. 8) (articulating that a prince is bound by the covenants he undertakes except when, in his unilateral judgment, "they cease to satisfy the claims of justice."); THOMAS HOBBES, LEVIATHAN: PARTS ONE AND TWO 254-44 (The Liberal Arts Press 1958) (1651) (ch. 29) (recognizing the sovereign is bound by natural law, albeit subject to unilateral interpretation).


57. Id. at 11.

58. In the United States, for example, the internal legal effects of even "self-executing" treaties are nullified to the extent of subsequent inconsistent Congressional enactments.
acts frequently license subordinate officials (and ordinary citizens) to engage in forcible or otherwise harmful acts that would, but for such license, be deemed criminal, and these exculpatory enactments may violate the state’s international obligations. Where U.S. officials implement enactments that violate “non-self-executing” international obligations, they are acting, not under mere “color” of sovereign authority (as where the enactment violates the Constitution), but under actual sovereign authority. Invocations of international law to nullify the legal effects of such enactments, thereby to hold state-licensed actors legally responsible to international standards as though those standards were directly applicable, come into conflict with the nullum crimen principle. The same conclusion applies as well in favor of the highest officials who, in exercising a legislative or executive function, undertake the sovereign decision, within the scope of their authority under the domestic regime, to breach the state’s corporate obligations.

Again, this is by no means to deny that some acts committed within the scope of state authority are, by international treaty and custom, excepted from the substantive immunities that sovereignty ordinarily confers upon those acting in its service. These exceptions are an affirmation that certain core moral principles are so indispensable to legality’s essential purposes as to transcend ideology, culture, and historical circumstance; violations of those principles are transcendent crimes.


59. “The principle of international law, which under certain circumstances, protects the representatives of a state [by excluding personal responsibility under the doctrine of sovereignty], cannot be applied to acts which are condemned as criminal by international law.” Judicial Decisions: International Military Tribunal (Nuremberg), supra note 51, at 220-21. The Tribunal’s rhetoric in regard to crimes “committed by men, not by abstract entities” is sometimes taken out of context to imply the personal responsibility of officials for breaches of a state’s legal obligations more broadly, but nothing in the passage, nor in the surrounding circumstances, suggests that broader meaning. Id. at 221.

60. These crimes are frequently discussed as violations of peremptory norms of international law, or jus cogens. Although they may well be that, the conflation of international crimes and jus cogens is a category error; a jus cogens violation is neither a sufficient nor a necessary condition of an international crime. For instance, United States
But if this character were to be ascribed to human rights violations generally (i.e., if all positive enactments that have authorized harsh measures in the service of perpetuating an illiberal public order were to be retroactively or extraterritorially invalidated), vast numbers of public officials (and private citizens who cooperate with them) would be vulnerable to criminal prosecution, and even more to tort claims, once subject to the jurisdiction of an unfriendly regime. A U.S. national need only imagine the fate of fellow citizens who participate in governmental policies pertaining to the death penalty, imprisonment, immigration, or homelessness—all subject to international condemnation that may at some point be reflected in a judicial determination—to value the distinction between incorporated and unincorporated international legal standards.

It appears that the GDR legal system, like that of the United States, combined elements of the monist and dualist approaches to the relationship between international and domestic law. On the one hand, Article 51 of the GDR Constitution required the passage of implementing legislation for treaty provisions to have the status of domestic law; the ICCPR, as a ratified but unincorporated treaty, thus, had no such status. On the other hand, Article 95 of the GDR Criminal Code appears to work a relevant incorporation:

Any person whose conduct violates human or fundamental rights, international obligations or the national sovereignty of the German military assistance to Nicaraguan insurgents in the 1980s has been authoritatively (and correctly) pronounced to have been a violation of jus cogens. See Military and Paramilitary Activities, supra note 54, at paras. 190, 228, 238. But it does not follow that the individuals responsible for the policy are subject to criminal liability, let alone that the policy was something other than an authentic act of state. Conversely, treaties may establish the criminality of acts committed under color of state authority, yet only within the jurisdiction of the consenting states parties.

61. The last five paragraphs, as well as other parts of this section, have been adapted from a previous article that attempts a broader theoretical statement on the relationship between state sovereignty and human rights. See Brad R. Roth, Anti-Sovereignism, Liberal Messianism, and Excesses in the Drive Against Impunity, 12 FINNISH Y.B. INT’L L. 17, 32-33 (2001).

62. Peter E. Quint, The Border Guard Trials and the East German Past—Seven Arguments, 48 AM. J. COMP. L. 541, 554 (2000). See also Rivers, supra note 39, at 51 (stating “the majority of commentators were fairly clear that the [GDR] system was dualist,” and therefore criticized FRG Federal Court of Justice “for misunderstanding the East German system.”).
Democratic Republic may not plead . . . statute law, an order or written instructions in justification; he shall be held criminally responsible.63

The European Court of Human Rights thus concluded: “Even supposing that [individual criminal] responsibility cannot be inferred from . . . international instruments on the protection of human rights, it may be deduced from those instruments when they are read together with Article 95 . . . .”64

The Court’s argument is plausible as a general proposition. Through Article 95, the GDR clearly sought to assert for itself a standing, both in strictly moral terms and as a member of the international community, that contrasted sharply with that of the Third Reich. It can thus properly be held to that assertion, opening the door to the nullification of defenses that might otherwise have been available under GDR law.

Still, the Court’s application of Article 95 to this case is highly problematic. The Court takes the position, in regard to the GDR’s obligations under Article 12 of the ICCPR, that “it cannot be contended that a general measure preventing almost the entire population of a State from leaving was necessary to protect its security, or for that matter the other interests mentioned [in Article 12(3)].”65 The GDR nonetheless did so contend,66 and was supported in that contention by the community of socialist states, by reference to which the GDR oriented itself in international affairs, and which constituted one of the three major blocs that comprised the larger international community in the Cold War era. Moreover, precisely because of the absence of state consent and international consensus, the international system lacked the mechanisms for generating an authoritative interpretation and binding application of either the ICCPR or customary human rights law. If condemnation had come from a genuine cross-section of the international community, the effect might have been to cure this defect, but such unsystematic (not to say partisan) condemnations as governments and non-governmental organizations actually issued against the GDR’s border practices cannot be said to have amounted to a binding judgment. Whatever the Court’s present

64. Krenz, 49 I.L.M. 773 at para. 104.
65. Id. at para. 100.
66. See Rivers, supra note 38, at 48.
view of the matter, the GDR, a non-party to the European Convention on Human Rights, was not subject to the Court's judgment.

The point here is not to criticize the Court's conclusion that the GDR border practices constituted an international wrong; this is certainly a legitimate conclusion as an objective matter, even if a less obvious one than is widely assumed. That conclusion, however, should not control the retrospective interpretation of "human or fundamental rights" and "international obligations" under Article 95 of the GDR Criminal Code. Once again, any interpretation of GDR law that pretends to authenticity must operate through the lens of "socialist legality." It is implausible that a jurist operating in that jurisprudential context (again, putting aside all corruption or coercion that may also have marked that system) would read Article 95 to nullify a defense based on an interpretation of the GDR's obligations that was controverted in the international system, that had been rejected by the GDR's socialist allies, and that threatened the ruling party's conception of the very national sovereignty considerations highlighted in the same Article and throughout the Criminal Code.

Moreover, idiosyncracies of Marxist-Leninist jurisprudence aside, even a rule-of-law-oriented domestic legal system's incorporation of international law is not necessarily a license to impute to domestic law a controverted interpretation of international norms. U.S. courts, for example, systematically defer to Executive Branch interpretations of U.S. international obligations.\(^6\)\(^7\)

In sum, it is an imposition of ex post facto criminal law to impute a nullification of defenses to the domestic incorporation of international law, where the norm retrospectively deemed to have been incorporated reflects the adverse side of an international legal controversy that, even if now resolved, was unresolved at the time of the acts in question. The convoluted

\(^6\) See, e.g., Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982). "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." Id. at 184-85. Moreover, U.S. courts have adopted some notably improbable interpretations of treaty standards that would otherwise have empowered individuals vis-à-vis the Executive. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655 (1992) (U.S.-authorized transborder abduction of a Mexican national to stand trial in the U.S. does not violate U.S.-Mexico extradition treaty); Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) (duty of non-refoulement contained in treaty and in implementing legislation does not apply to return of refugees to the country of their persecution where the refugees were intercepted on the high seas).
method does not alter the substance of the project.

C. Retroactivity through the Invocation of Natural Law

The fundamental problem with the first two methods of establishing the criminality of GDR border practices is simpler than the elaborate discussion above may suggest. Both methods seek to keep faith with the nullum crimen principle by contending that the ex-officials violated norms that the regime itself had espoused. But the GDR border practices, more than any other Cold War-era phenomenon, precisely represented the overt clash of values between East and West. The prosecutions are transparently an effort to condemn Communism itself as an unjust system of public order, and to hold individuals criminally accountable for forcibly implementing its values. Although some of the border cases involved gratuitous uses of force, these have not been the main focus, nor the main point, of the prosecutorial project. The pro-prosecution arguments reviewed above—the only bases for the convictions that the European Court was willing expressly to adopt—are unpersuasive precisely because they are essentially disingenuous, a fact that frustrates the prosecutions’ strongest supporters as much as it does their opponents.68

At the heart of the prosecutions, as reflected in the FRG Federal Constitutional Court’s 1996 judgment in the cases of Streletz and Kessler, is the counter-principle to nullum crimen known generally as “Radbruch’s formula” for the “disapplication” of positive law.69 That Court explicated the


69. Krenz, 49 I.L.M. 773 at para. 104. The Radbruch formula came most prominently to the attention of English-speaking legal scholars in the course of the famous 1958 debate between H.L.A. Hart and Lon Fuller on the relationship between law and morality. H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 615-21 (1958); Lon Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 648-61 (1958). A focal point of the debate was an FRG prosecution in 1949 of the wife of a World War II German soldier. The woman, apparently for ulterior and utterly non-ideological reasons, had informed the Nazi authorities of her husband’s anti-Fuehrer grumblings, knowing (and indeed, intending) that this would lead to her husband’s arrest and death sentence. Id. at 652-53. Radbruch and Fuller, albeit for somewhat different reasons, straightforwardly favored the nullification of defenses based on Nazi enactments effectively authorizing limitless punishment of even privately-expressed dissent, whereas
formula as follows:

[Positive law should be disapplied only in absolutely exceptional cases and that a merely unjust piece of legislation, which is unacceptable on any enlightened view, may nevertheless, because it remains inherently conducive to order, still acquire legal validity and thus create legal certainty. . . . However, the period of National Socialist rule had shown that the legislature was capable of imposing gross “wrong” by statute . . ., so that, where a statutory provision was intolerably inconsistent with justice, that provision should be disapplied from the outset . . . 70]

Whatever the abstract merits of nullifying atrocious exculpatory enactments, the “intolerably inconsistent with justice” formula simply begs the question: When is leaving an egregious wrongdoer unpunished more intolerable than using law to punish someone whose acts, though objectively immoral, were lawful—and therefore presumably considered by the effective authorities and their supporters to be morally justified—when and where committed? The formula is alluring in the realm of thought experiments, where the mind that judges the propriety of licensing such decisions is the same one that would be entrusted with the license to decide the extent of objective immorality. 71 As an institutional matter, however, the formula invites precisely the kind of subjective judgment, pertaining to the exercise of power over the most fundamental human interests, that the rule of law distrustfully precludes. This observation does not refute Radbruch’s formula, but does counsel caution in licensing its application.

The Nazi experience was an extraordinary circumstance that justified an extraordinary response. Any suggestion of “moral equivalence” between the GDR and Third Reich regimes is unsustainable. The GDR pursued an ideological mission at odds with liberty and democracy, but however

70. Krenz, 49 I.L.M. 773 at para. 22.

71. However much it may appear to the contrary, the argument herein is at no point predicated on moral relativism. The entire discussion proceeds on the assumption that universal moral truths both exist and are, in principle, humanly discernible. It nonetheless emphasizes the endemic reality of moral disagreement on matters of the utmost seriousness, even among the most intelligent, best-informed, and best-intentioned human beings. It therefore pursues the most morally sound institutional response to that objective reality.
misguided and corruptly implemented, that mission entailed no offenses even remotely akin to the Third Reich's multiple genocides and pan-continental aggression. The GDR participated in an international system of peaceful coexistence, whereas the Third Reich set out to destroy, and did destroy, such a system. The GDR regime ultimately—due in some measure to the actions, or at least the forbearance, of Egon Krenz—yielded power peaceably; the ouster of the Nazi regime came only as a result of the most catastrophic war in human history.

Repugnant as the GDR border enforcement practices were, they were designed to prevent otherwise-unpreventable violations of a law that was, at least in terms of aggregate compliance, essential to the state's vital interests. Moreover, the victims, while guilty of no act that can justly be called immoral, willingly encountered a known risk, in defiance of multiple warnings. Concededly, the use of deadly force in any one case appears disproportionate to the harm to state interests posed by any one successful border crossing, but a similar logic might equally condemn various enforcement practices that can be found in liberal-democratic states.

Of course, solicitude for the vital interests of the GDR cannot be taken as a given. It is difficult to resist the conclusion that the border prosecutions ultimately embody—and indeed, intend—a retrospective de-legitimation of loyalty to the political project that the GDR represented. Yet although the regime was widely unpopular, it should be remembered that many people

72. Ironically, by helping to block the use of force against demonstrators in Leipzig and then unseating the recalcitrant Erich Honecker in October 1989, Krenz likely prevented much more bloodshed than that which the FRG prosecutors have managed to attribute to him. The extent to which Krenz contributed affirmatively to the peaceful transition remains controverted. See, e.g., MARY FULBROOK, ANATOMY OF DICTATORSHIP: INSIDE THE GDR, 1949-1989 at 256-57 (Oxford University Press, 1995). "The main initiative [for the decision to refrain from using force against the Leipzig demonstrators] appears to have been taken by regional and local functionaries," though the decision was then "officially ratified by the then security chief Egon Krenz." Id.

73. It is worth noting that from 1993 to 1997, the first four years of a stringent border control regime instituted in Southern California, many more people died seeking to enter the United States from Mexico than died seeking to leave East Germany in the twenty-eight years of the Berlin Wall's existence; although the former deaths did not result from shootings, they did result from known consequences of deliberate policies. See Peter Andreas, Borderless Economy, Barricaded Border, 33 NACLA REPORT ON THE AMERICAS, No. 3, 14, 17 (1999) (citing University of Houston study putting the four-year death toll of would-be immigrants to the U.S. at 1,185).
of good faith and sound intelligence supported that project. Their reasons, however mistaken, were not inherently evil; indeed, the GDR, and the Communist movement in general, invoked principles that had considerable moral appeal.\textsuperscript{74}

Recourse to the retroactive nullification of exculpatory GDR law makes, in effect, a remarkable claim for the particular set of liberal-democratic norms that gained ascendancy in the 1990s: that these norms not only have been everywhere and always correct, but so intuitive that anyone who acted within an opposing normative system is chargeable with having had constructive knowledge of their correctness. Such a claim more properly befits illiberal systems, which characteristically regard dissidence as unnatural and corrupt, and which employ open-ended penal laws to deny legal protection to those manifesting base dispositions. Moreover, such a claim repudiates—both retroactively and prospectively—the sovereign equality of liberal and non-liberal states that has anchored the international legal system, and more generally the idea of peaceful and respectful accommodation among bearers of opposing conceptions of public order.

In sum, all of the rationales offered for sustaining the convictions of Krenz and his fellow high officials run afoul, not only of \textit{nullum crimen sine lege} as a technical matter, but of the fundamental considerations that the \textit{nullum crimen} norm represents. That the defendants may be said to have assumed, by their ruthlessness, the risks of “victor’s justice” does not affect the impropriety of these convictions in a liberal-democratic legal system bound to the highest standards of human rights observance.

V. LOOKING AHEAD: RETROACTIVITY AND THE DANGER OF POLITICAL ABUSE OF LEGAL PROCESSES

Not long ago, the rhetoric of human rights operated primarily as a shield, not a sword. It was a language of resistance to power, not a language for the exercise of power. As such, human rights rhetoric could afford to be bold, sweeping, and imprecise, even in its legal formulations. The state—its interests and its values—would inevitably be well-represented, both in political fora and in court. Human rights advocates could concentrate on rousing consciences to affirm the dignity of human beings menaced by the power of the state, without much regard to an overall balance of

\textsuperscript{74} See Roth, \textit{supra} note 14, at 75-120.
jurisprudential (let alone policy) considerations; there was no real danger of excess in promoting dignity-oriented constraint on state action. Therefore, human rights scholars frequently set for themselves the goal of substantiating the broadest and deepest claims of the human rights movement, and nay-saying scholars often confronted moralistic criticism of their efforts.

Such an attitude is maladaptive to the current period, in which human rights are invoked to justify exercises of power, ranging from prosecutions of former officials of adverse states to bombings, invasions, and occupations. In this context, there is a danger that legal proceedings can be transmogrified into festivals of self-righteousness, orchestrated not only to designate scapegoats for international dissensus, but also to reveal the fecklessness of those who counsel restraint and compromise in the face of a certified evil.75

The retrospective prosecutions of GDR leaders in FRG courts, though by no means closely resembling that grim image,76 had hints of both aspects. The post-unification determination to affix the stain of criminality to leading GDR figures led, not only to the Berlin Wall convictions (which, however legally dubious, responded to a genuine human interest in affirming the dignity of the victims), but also to the conviction (ultimately overturned pursuant to a Federal Constitutional Court judgment) of spymaster Markus Wolf for espionage activities similar to those conducted by his FRG intelligence counterparts, and to the truly bizarre conviction of former GDR Prime Minister Hans Modrow, who had presided over the Communists' relinquishment of power in 1990 and had remained influential in post-unification politics, for having earlier falsified results in an already-undemocratic GDR election.77 Moreover, retrospective criticism of Western accommodationist policies toward the GDR appears to have been at least some part of the motivation for the prosecutions.

The danger that human rights-based prosecutions may be politically

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75. In addition to hardening positions (akin to the insistence that one “never negotiate with terrorists”), attributions of criminality to adverse regimes tend to place enforcement demands on international institutions that such institutions characteristically cannot bear, opening the door to unilateral exertions that can be rationalized as implementation of universal principles.

76. For a sympathetic account of the prosecutions, see A. JAMES MCADAMS, JUDGING THE PAST IN UNIFIED GERMANY 23-54 (New York: Cambridge Univ. Press, 2001).

77. See QUINT, supra note 48, at 206-14.
abused highlights the need to demand rigor in adherence to exculpatory principles such as *nullum crimen sine lege*. In all but the most atrocious cases, fairness precludes holding individuals criminally accountable to standards, however objectively correct, that demand the individual to have disregarded the prevailing normative conception of the time and place, for this is more than can justly be demanded of most human beings on either side of a political and ideological divide. The integrity of law must be guarded against the temptation, which may become more widespread as human rights-based prosecutions increase, to use legal processes to pillory such individuals for the sake of a political message—and a dubious political message at that.