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Topic:

Transitional Criminal Justice after German Unification and its International Impact

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Declaration

I declare that*, Transitional Criminal Justice after German Unification and its international impact* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

20 October 2010

Full name

Signature

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Abbreviations

DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
ed(s).	editor(s)
et seq.	and the following
FNI	Front des Nationalistes et Intégrationnistes
FRG	German Republic of Germany (BRD)
FRPI	Force de Résistance Patriotique en Ituri
GDR	German Democratic Republic (DDR)
Ibid.	in the same place
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICC-Statute	Rome Statute of the International Criminal Court. Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2001. The Statute entered into force on 1July 2002
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
IMT Charter	Charter of the International Military Tribunal, 8 August 1945, in: Der Internationale Militärgeichtshof, Dokumente Part I at 12.
marginal no.	marginal number
NDC	National Defence Council, Nationaler Verteidigungsrat
OPT	Office of the Prosecuter (ICC)
p., pp.	page(s)
para(s).	paragraph(s)
SED	Sozialistische Einheitspartei Deutschlands
StGB	Strafgesetzbuch (German Criminal Code)

Chapter 1: Introduction

The German Unification had its 20th anniversary this year on 3 October.

For over forty years (1949-1990) Germany was divided into east and west. The border and particularly the Berlin Wall between the democracy in the west and a repressive regime in the east symbolized the division between two systems and societies. The shootings of fugitives at the Berlin Wall constituted the most dramatic examples of the violence exercised by the socialist state in the east.[1] The instructions which were given to the border guards who implemented the policy of the leadership were aimed at preventing flight at all costs.[2] At least 264 people were killed at the inner-German border between 1961 and 1989.[3]

After Unification in 1990, Germany had to challenge the question, how to resolve the past and how to deal with the past injustices from the socialist regime. Germany used different instruments to resolve the past. The most effective yet the most controversial way were the criminal prosecutions of

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[1] Gerhard Werle, "Criminal justice and state criminality: The current German position", in: Merdard Rwelamira/Gerhard Werle (eds.), *Confronting Past Injustices Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany*, Human Rights and Constitutional Law Series of the Community Law Centre, University of the Western Cape, Durban: Butterworths, pp. 21-31 (1996), 27.

[2] Manfred J. Gabriel, "Coming to Terms with the East German Border Guard Cases", *Columbia Journal of Transnational Law,* 38. Vol., pp. 375-418 (1999) 375.

[3] Atkinson, "Searching for Truth by the Wall- East German Files Reveal New Cases of Fatal Refugee Shootings", *Washington Post*, (Aug. 12, 1993) at A29.
Organizations representing the victims´ families speak of almost 1000 dead persons.
European Court of Human Rights, *Case of Streletz, Kessler and Krenz v.Germany,* Applic. nos. 34044/96, 35532/97 and 44801/98, judgment of 22 March 2001, para. 13, [Online] http://www.menschenrechte.ac.at/orig/01_2/Streletz.pdf (accessed on 12 October 2010). See also Klaus Marxen, Gerhard Werle, *Die strafrechtliche Aufarbeitung von DDR- Unrecht- Eine Bilanz*, Berlin/New York: Walter de Gruyter (1999), 174; Toralf Rummler, *Die Gewalttaten an der deutsch-deutschen Grenze vor Gericht*, Berlin: Berliner Wissenschafts-Verlag (2000), 1.

the leadership officials who served the former suppressive regime. The border guards and their superiors were convicted for homicide.

After an overview of the transition process and the different mechanism used to resolve the past, this research paper will focus on the conviction of the former political leadership whose decisions led to the shootings at the wall. The convictions stand as a symbol of transitional criminal justice. The cases went through all judicial instances in Germany up to the level of the European Court of Human Rights (hereinafter ECHR). They are a "significant part of the effort of joining two societies and building a stable democracy for the future".[4] The main focus of the research paper will be an analysis of the application of judicial concepts under which the East German members of the Political Bureau were convicted and how this has been assessed by the ECHR. Of utmost importance will be the jurisprudence in respect of what has become known as the concept of "the perpetrator behind the perpetrator" (Täter hinter dem Täter). The German courts acknowledged that a person who acts through another may be individually criminally responsible, regardless of whether the direct perpetrator is also responsible. The research will analyze the limitation of the prohibition of retroactive punishment and the human rights friendly interpretation of East German law. This paper will also discuss the trials against the Congolese warlords *Katanga and Chui* and the warrant of arrest against the Sudanese President *Al Bashir* in order to prove the influence of the German jurisprudence on the practice of the International Criminal Court (hereinafter ICC). Of special interest will be the analysis of

[4] Gabriel (1999), 375.

the principle of “perpetration-by-means” applied by the Pre-Trial Chamber and the Office of the Prosecutor of the ICC in these cases. In addition, the paper will focus on the international application and the impact of this principle. The aim of the research paper is to demonstrate that the German border guard trials have given rise to important precedents, both national and international, which had and still have an impact on trials of the former leadership of a despotic state. The research will prove the influence of the decisions of the German courts on the precedents and will evaluate if the applied principles can be adopted in other states which have to come to terms with their past.

Twenty years after German Unification the so called border guard cases can be regarded not only in the sense that they strengthened the transition process, but also as a precedence in transnational criminal justice and as a gain for international law.

Chapter 2: Historical and Political Background

I. The way to German Unification

After the German capitulation World War II ended on May 8 of 1945. The allies divided Germany in four occupation zones. The Federal Republic of Germany (hereinafter FRG) in the west was occupied by the French, the British and the U.S.[5] The Soviet occupied and administrated the eastern

[5] Berlin Regional Court, *Case of Kessler, Streletz and Albrecht*, No. (527) 2 Js 26/90 Ks (10/92), judgment of 16 September 1993, in: Klaus Marxen, Gerhard Werle (eds.), *Strafjustiz und DDR-Unrecht, Dokumentationen, Gewalttaten an der deutsch-deutschen Grenze*, Band 2/2. Teilband, Berlin: De Gruyter 501- 598 (2002), para. 5; Christoph Schaefgen, “Dealing with the Communist Past- Prosecutions after German Reunification”, in Werle (ed.), *Justice in Transition- Prosecution and Amnesty in Germany and South Africa*, Band 29, Berlin: Berliner Wissenschaftsverlag, pp. 15- 26 (2006), 15.

Zone, and soon began to establish a communist system with a socialist government, the German Democratic Republic (hereinafter GDR).[6] In 1949 a constitution, the Basic Law (Grundgesetz) was adopted in the FGR which contained in its preamble that the German people and the government seek the unification of Germany as a free nation.[7] The Socialist Unity Party of Germany (Sozialistische Einheitspartei Deutschlands- hereinafter SED) emerged in the east and key positions in the government and the judiciary were filled by party members. Private industries were nationalized and a planned economy introduced.[8] The communist regime turned into a dictatorial system which did not tolerate political opposition. There was no separation of powers as conceived of by the concept of rule of law.[9] Dissidents and those trying to escape were systematically kept under observation by the Ministry of State Security (Ministerium für Staatssicherheit) and were treated strictly.[10] The oppressive measures taken by the GDR government led to increasing flight from the East to the West. Many people fled by crossing the inter-German border illegally.[11]

Berlin had a special legal status for all victorious powers and was

[6] See J. P. Nettl, *The Eastern Zone And Soviet Policy in Germany 1945-50*, Oxford University Press (1951), 74-113.
[7] Gabriel (1999), 380.
[8] See Henry Ashby Turner, *The Two Germanies since 1954*, London: Yale University Press (1987), 109.
[9] Marxen/Werle, (1999), 54, Gabriel (1999), 410.
[10] In 40 years the Ministry of State Security formed an extensive and highly hierarchical structure with almost 90.000 full-time stuff by the end. Gerhard Werle, Moritz Vormbaum, "After the Fall of the Berlin Wall – Transitional Justice in Germany", pp. 1-54 (2010, forthcoming), 4; Marxen/Werle (1999), 75 et seq.
[11] Gabriel (1999), 381; Norman Gelb, *The Berlin Wall, New York: Crown* Publishing Group (1987), 39, 57-64.

therefore also divided into four zones.[12] By the height of the Cold War in 1961, East Germany had lost more than 2.5 million inhabitants to illegal emigration into West Germany. In response the government sealed and protected the border between East and West Germany.[13] In August 1961 barricades were erected and the Berlin Wall was built within days. This fortification was reinforced by automatic-fire systems and antipersonnel mines.[14] The political leaders of the GDR fortified the border, while insisting that it was an "anti-fascist wall", to protect the East German population from the "fascist" west.[15] The GDR denied its inhabitants the right to leave the country and the attempt to flee was a serious crime.[16]

The situation changed after the collapse of the Soviet Union. A peaceful revolution in East Germany and the fall of the Berlin Wall in 1989 led to the end of the repressive system. After the SED General Secretary *Erich Honecker r*esigned, the entire GDR government followed. On 18 March 1990, the first free elections were held in East Germany. On 3 October 1990, the GDR officially joined the FRG on the basis of the Unification Treaty and the law of the FRG extended to East Germany. [17]

[12] Schaefgen (2006), 15.
[13] Gelb (1987), 64.
[14] Beate Rudolf, „Streletz, Kessler and Krenz v. Germany. App. Nos. 34044/96, 35532/97, & 44801/98.49 ILM (2001), European Court of Human Rights, Grand Chamber, March 22, 2001", *The American Journal of International Law*, Vol. 95, No. 4, pp. 905-910 (October 2001), 905.
[15] German Propaganda Archive, "What should you know about the Wall", (February 1962), [Online] http://www.calvin.edu/academic/cas/gpa/wall.htm (accessed on 12 October 2010).
[16] Gabriel (1999), 381; In severe cases, the "illegal border violation" was punishable by one to eight years of imprisonment. See Robert Alexy, „Mauerschützen: Zum Verhältnis von Recht, Moral und Strafbarkeit", Hamburg (1993). in: Alexy/Koch/Kuhlen/Rüßmann, *Elemente einer juristischen Begründungslehre*, Baden-Baden, pp. 469-492 (2003), 480.
[17] Werle/Vormbaum (2010, forthcoming), 5; Schaefgen (2006), 16.

II. Transition and Criminal Justice

1. West Germany as a mature democracy

It was the second time that a totalitarian state in recent Germany passed out of existence. The unified Germany had to deal with past state injustice and faced the question of individual guilt.[18]

The fall of the Berlin Wall was a "symbol of the will for freedom of the people, for historical possibilities and the historical defiance, [and] for future politics to configure themselves on equality, fairness, and real democracy".[19] However, this symbolic event did not create a new society based on justice and trust. The past had to be resolved which included calling the previous leaders and their henchman to account. The transition process in Germany was different from other countries, challenging to resolve the past. There are three different types of transition societies. The post- conflict societies, authoritarian and conflict- ridden societies, and mature democracies.[20] Given the fact that West Germany was a stable and affluent democracy, the transition process of East Germany can be classified as a transition to a mature society. The transition process from socialism to democracy was not only privileged because the GDR accessed to the FRG, but also that West German judges had to apply former East German law. Germany had over forty years experience with

[18] The unique term "Vergangenheitsbewältigung" which can be best translated in "mastering the past" or "resolving the past" describes this process, Gabriel, (1999), 376.
[19] Newsletter Stiftung Aufarbeitung, *20 Years Peaceful Revolution and German Unity* (May 2009), 3 [Online] available: http://www.stiftungaufarbeitung.de/downloads/news/News20years.pdf (accessed on 14 September 2010).
[20] David A. Crocker, "Reckoning with Past Wrongs: A Normative Framework," *Ethics & International Affairs*, Vol. 13, pp. 43 et seq. (2004), 43-44; Gabriel (1999), 379.

the traditions of the *Rechtsstaat* (the state under the rule of law).[21] Therefore a functional justice and administrative system existed which made it possible to investigate and prosecute.

2. Mechanisms to resolve the past

The unification involved the challenge of bringing two states together, to reconcile the perpetrators and the victims, and to format and consolidate trust in the reunified Germany as a state by the rule of law. Those expectations could not be fulfilled with criminal law alone.[22] To confront the past and deal with the GDR injustices all tools of transitional justice were used.

a) Rehabilitation

The SED- regime combat political enemies within the country with coercive measures such as imprisonment, forced resettlement, and professional bans which led to deprivation of freedom or loss of property.[23] Furthermore the victims suffered from being marked as criminals.

Art. 17 of the Unification Treaty[24] emphasized the intention to create the legal basis for rehabilitating any persons "who were victims of politically motivated criminal prosecutions or other legal decisions that violated rule of law and the constitution". Art. 18 and Art. 19 provided that criminal

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[21] James A. McAdams, "Communism on Trial: The East German Past and the German Future", in: James A. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, Indiana: University of Notre Dame Press, pp. 239-268 (1997), 239.
[22] Schaefgen (2006), 17.
[23] Martin Ludwig, "Die Rehabilitierung der Opfer", in: Albin Eser, Jörg Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht*, Band 2, Deutschland, Freiburg: iuscrim edition (2000), 434 et seq; Werle/Vormbaum (2010, forthcoming), 6.
[24] Unification Treaty of the FGR and the GDR of 31 August 1990 (BGBl II, p. 889).

conviction and administrative acts could be reversed. Two laws were enacted to concern criminal and administrative rehabilitation.[25] Their strict requirements narrowed the scope which was originally intended by the Unification Treaty and full compensation was not generally awarded.[26]

Rehabilitation for everyone was difficult, since the majority of East German citizens were disadvantaged by the measures taken by the SED government. However, it can be criticized that no exclusively moral reparations were possible due to the reparations provisions inseparably linked rehabilitation and compensation.[27]

b) Restitution of property

The Property Law[28] regulated the restitution of expropriate and nationalized real estate and means of production. Therefore the Trusteeship Agency was established which was responsible for administering and privatizing East German state industries.[29] Given the long-past systematic expropriation, unemployment in the east and the lack of competitive infrastructure for business, a complete resumption was not possible. The numerous laws enacted to regulate restitution demonstrate that the lawmakers tried hard to find suitable and fair solutions.[30]

[25] Rehabilitation Laws of 4 November 1992 (BGBl I, p. 1814) and of 23 June 1994 (BGBl. I, p. 1311).
[26] Ludwig (2000), 453.
[27] *Ibid.* 463; Werle/Vormbaum (2010, forthcoming), 8.
[28] Enacted on 3 August 1992 (BGBl. I, p. 1446).
[29] Hermann-Josef Rodenbach, „Die Reprivatisierung in den neuen Bundesländern", in: Georg Brunner (ed.), *Juristische Bewältigung des kommunistischen Unrechts in Osteuropa und Deutschland*, Berlin: Berlin Verlag Arno Spitz (1995), 290.
[30] Werle/Vormbaum, (2010, forthcoming), 12.

c) Access to "Stasi" files

A federal agency was established to archive and administer the numerous files of the Ministry for State Security which spied the East German citizens for forty years. The Stasi File Law promoted historical and legal research. It made it possible for East Germans to access their files and granted information on who gave information about them to the regime.[31]. This has caused thousands of public employees to be dismissed. Some democratic leaders were revealed as former informants.[32]

d) Purging of the public sector

After Reunification the Civil Service Law of the FRG applied to East Germany because Art. 3 of the Unification Treaty declared the Basic Law applicable to the new eastern states.[33] Servants from the public sector were screened for possible activity as informers. Their removing was a serious intervention in the lives of many eastern Germans. Among other sectors the courts were purged, the incriminated judges were replaced by West German judges.[34] After the East Germans had lived 12 years under Nazi dictatorship and 43 years under the suppressive communist regime, a clear signal was necessary for citizens to gain renewed confidence in

[31] Behörde der Bundesbeauftragten für die Stasi –Unterlagen, www.bstu.bund.de, Akteneinsicht [Online] http://www.bstu.bund.de/cln_012/nn_715182/DE/Akteneinsicht/akteneinsicht__node.html__nnn=true (accessed on 11 March 2010).

[32] Jamal Benomar, "Confronting the Past: Justice after Transitions", *Journal of Democracy*, Vol. 4, No. 1 (January 1993), 6, [Online] http://muse.jhu.edu/journals/journal_of_democracy/v004/4.1benomar.pdf (accessed on 10 March 2010).

[33] Werle/Vormbaum (2010, forthcoming), 17, 18.

[34] Michael Bohlander, "United We Stand- The Judiciary in East Germany After the Unification", *Anglo-American Law Review*, Vol. 21 (1992), 415, 422, 423.

the system. The aim was to strengthen East Germans´ trust in the democratic system and the public administrative apparatus.[35]

e) Enquete Commission

Between 1992 and 1998 two Enquete Commissions of the German Bundestag (parliament) investigated the history of the SED dictatorship and its effects on German Unity.[36] The aims were the strengthening of democratic self-confidence and the further development of a common political culture in Germany. The Commissions' aims were national reconciliation, the deterrence and prevention of future dictatorship and that the Bundestag addresses the legacy of communism.[37]

As a result its' recommendations, in 1998 a publicly funded "Foundation for the Reconciliation of the SED Dictatorship" to coordinate research, educational activities and assistance to victims' organizations was established.[38] The Commission established the awareness for the past and the huge amount of information contained in the report is of great historical and political value.

[35] Werle/Vormbaum(2010, forthcoming), 17, 18.
[36] Newsletter Stiftung Aufarbeitung (2009), 16.
[37] Deutscher Bundestag, Materialien der Enquete-Kommission ‚Beschlussempfehlung und Bericht der Enquete-Kommission, „Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland" (12. Wahlperiode des Deutschen Bundestages), Vol. 1, 29, 188, Drucksache 13/11000 vom 10.06.1998.
[38] Andrew H. Beattie, "An Evolutionary Process: Contributions of the Bundestag Inquiries into East Germany to an Understanding of the Role of Truth commissions", *International Journal of Transitional Justice*, Vol. 3, Issue 2, pp. 229-249 (2009), 246; see also Homepage Bundesstiftung zur Aufarbeitung der SED-Diktatur www.stiftung-aufarbeitung.de.

f) Criminal prosecutions instead of amnesty

A general amnesty as a concrete alternative to criminal prosecution was rejected. The reunified Germany had decided to prosecute the perpetrators for their injustices.[39] Those who supported an amnesty believed that prosecutions would make the reconciliation process more difficult because they would create tensions among East Germans.[40] Furthermore they argued that prosecutions would take too long and were too expensive. However, not investigating the crimes that had been committed would have sent the wrong signal to the victims.[41]

Amnesty is only an option for dealing with the past when leaders agree to end a conflict or allow democracy only under the condition of impunity for crimes committed under their regime.[42] In transitions of South Africa or Argentina, amnesty was the price of a peaceful transfer of power and negotiated freedom.[43] Given that the communist system had ended following a peaceful revolution and voluntary accession to the FRG there was no reason to refrain from prosecutions.

The Unification Treaty provided that acts committed in the GDR were to be prosecuted in unified Germany. The rule of law (Rechtsstaatsprinzip) determined in Art. 20 (3) Basis Law, demands that a state which enforces

[39] Schaefgen (2006), 16.
[40] Amnesty was demanded by PDS member (the follow up party of the SED), documented by Kai Rossig, Anye Rost, "Alternativen zur strafrechtlichen Ahndung des DDR-Systemunrechts", in Eser, Albin/ Arnold, Jörg (eds), *Strafrecht in Reaktion auf Systemunrecht*, Band 82.2 Deutschland, Freiburg: iuscrim edition, 521-536 (2000), 525.
[41] Werle/Vormbaum (2010, forthcoming), 21.
[42] Gerhard Werle, Principles of International Law, 2nd Edition, The Hague: TMC Asser Press (2009), para. 207.
[43] See A. Marcelo Sancinetti, Marcelo Ferrante, in Eser/Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht*, Band 82.3 Argentinien, Freiburg: iuscrim edition (2002).

its monopoly on the use of force, must enact and apply criminal laws to protect private rights.[44] Thereby the judiciary was obliged to undertake criminal prosecutions.

The unified Germany decided to prosecute the crimes committed by the high ranking GDR officials. The institutionalized injustice of the GDR urged the German courts not to make the mistakes made in dealing with the Nazi past, when prosecution of perpetrators was neglected, again.[45] The trials after Nuremberg in which high ranking Nazi officials were charged were perceived as a failure. The atrocities of the Nazis were represented as "something that had happened to the Germans rather than something done by the Germans".[46] It can be seen as the Germans´ second guilt that they failed to admit openly to their Nazi past. In not dealing with the past atrocities "on a personal, social, and legal level they denied the post war generation the chance of understanding and facing their background."[47]

The criminal prosecutions of the former GDR leaders made a significant contribution to elucidating the past. Since the beginning of the systematic prosecutions in October 1990 the judiciary did not change the course.[48] It was not an easy decision how far down the chain the prosecutions should reach.[49] The courts had to convict obvious violations of human rights and had to abide application of statutory law at the same time. The criminal

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[44] Gerd Pfeiffer (ed.), Strafprozessordnung Kommentar, 6th Edition, Munich: C.H. Beck Verlag (2008), § 152.
[45] Neil J. Kritz, "The Dilemmas of Transnational Justice", in: Kritz (ed.), *Transitional Justice*, Vol. II, Washington DC: United States Institute for Peace Press (1995), xix-xxx (1995,) xxx.
[46] Gabriel (1999), 377
[47] *Ibid.*
[48] Schaefgen (2006), 16.
[49] Kritz (1995), xxiii.

prosecutions of the unjust system as a mechanism to resolve the past were discussed very controversially. The trials were of high public interest and therefore received positive and negative perceptions. One should keep in mind that prosecutions determine individual guilt and should not be perceived as a collective accusation of guilt. The purpose of criminal prosecutions is not to crack down one particular case for all occurred past abuses. However, the identification with an accused which stands for the prior system is inevitable.

Even before the first free elections in 1990, investigations began under the successor government against members of the political leadership and high ranking officials of the previous regime. The systematic criminal prosecution of government crimes, such as electoral fraud, abuse of power, corruption, doping and perversion of justice committed under the SED dictatorship continued into 2005.[50] The trials referred to the crimes at the inner-German border were of special interest from the public, as well as from the legal point of view.[51]

The prosecutions cannot be assessed as "victor´s justice". East Germany acceded voluntarily to the FGR. The West did not judge about the past of the former East German citizens.[52] The courts judged serious human rights violations committed by perpetrators who served a repressive

[50] McAdams (1997), 239 et seq; Werle/Vormbaum (2010, forthcoming), 25.
[51] *Ibid*.; See Rummler (2000).
[52] Erardo Cristoforo Rautenberg, „Die strafrechtliche Aufarbeitung des DDR-Systemunrechts im Land Brandenburg aus staatsanwaltschaftlicher Sicht", in: Klaus Christoph Clavée, Wolf Kahl, Ramona Pisal (eds.), 10 Jahre Brandenburgisches Oberlandesgericht, *Festschrift zum 10jährigen Bestehen, Nomos-Verlagsgesellschaft*, Baden-Baden (2003), 97-130.

system. The convictions put "the final stamp of illegality"[53] on the previous communist regime. Approximately 100,000 investigations were undertaken, only 1,286 persons were accused and only 750 of them were convicted in the end.[54] The killings at the border led to 385 judgments, 110 ended in acquittals, 275 in convictions.[55] This demonstrates that West Germany followed the principles of the rule of law and did not arbitrary pick out a few of the many perpetrators who had served the repressive system and participated in it.

3. The German transition in comparison with others

The German experience has to be distinguished from the Latin American and African transitions. The latter had a hard-won transition from dictatorship to democracy.[56] Germany was already a stable parliamentary democracy with functioning institutions when the mechanisms to resolve the past were set up.[57] The repressive communist regime in Eastern Europe collapsed rapidly at the end of the 1980s whereas countries such South Africa or Argentina struggled a long time to cope with the prior system characterized by violence.[58] As mentioned above, in the African

[53] Peter E. Quint, "Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command", *The Review of Politics*, Vol. 61, No. 2, pp. 303-329 (Spring 1999), 327 [Online] http://www.jstor.org/stable/1408359 (accessed on 25 March 2010).
[54] Rainer Eppelmann, „Zum Geleit", in: Marxen/Werle/Schäfer, Die Strafverfolgung von DDR-Unrecht – Fakten und Zahlen, Berlin: Stiftung zur Aufarbeitung der SED-Diktatur, pp. 3-4 (2007), 4.
[55] *Ibid*.; Werle/Vormbaum (2010, forthcoming), 48.
[56] Geoffrey Robertson, *Crimes against Humanity, The Struggle for Global Justice*, Penguin Books, 3rd Edition (2006), 321.
[57] Beattie (2009), 232.
[58] On the Argentinian transition process see Sancinetti/Ferrante (2002).

and South American countries, the assurance of impunity was often the price paid for a negotiated transition.[59]

There is also a difference between the committed crimes. In Eastern Germany the systematic human rights violations were committed being covered by the law and were not as of the great extent as in the South African and American repressive systems.[60]

Due to the different conditions, the transition in Germany had another purpose, other effects and results.

Chapter 3: The Border guard trials

I. Factual Background

1. Hierarchical structures of the Political Bureau and the National Defence Council

The Political Bureau (Politbüro) was the political leadership council of the SED, and the most powerful political body in East Germany.[61] This ruling organ of the GDR made some decisions which perfected, strengthened, and perpetuated the border regime. Its task was to set policies and guidelines for the GDR Defence Ministry, such as plans for installing land

[59] A "negotiated revolution" can lead to significant limitations on the confrontation with the past. In the case of South Africa, amnesty was needed to promote reconciliation and reconstruction. See Gerhard Werle (ed.), *Justice in Transition* (2006), Session Two: The South Africa Approach, 39- 150.

[60] Robertson (2006), 321. Roberston states that the torture, disappearances and the other measures were not extreme enough to warrant the description of crimes against humanity.

[61] Adrian Webb, *The Longman Companion to Germany since 1945*, Longman Companions to History (1998), 83; ECHR, *Streletz, Kessler and Krenz v.Germany,* judgment of 22 March 2001, para. 14.

mines along the border.[62] Members of the Political Bureau decided to erect, seal and protect the borders to the west.[63] The Political Bureau created the National Defence Council (Nationaler Verteidigungsrat hereinafter NDC) as a state-owned organ in the areas of security, military, border protection and national defence. The NDC received legislative and executive authorization and was well organized. Every decision of the NDC corresponded to the pretended orientation of the Political Bureau. The Border Protection Act[64] which allowed the shootings at the Wall was planned and enacted by the committee of the Political Bureau and the NDC.[65]

2. The main defendants in the border general trials

The defendants of the former GDR leadership in the border guard general cases were *Heinz Kessler, Fritz Streletz, Egon Krenz and Günter Schabowski*.

Kessler had a leadership role in the GDR army upon it was founded in 1956, and became secretary of defence in 1985.[66] *Streletz* was also a powerful figure in the Ministry of Defence for decades. He was chief of staff of the GDR army, and deputy minister of the NDC.[67] *Krenz* was a

[62] See Constitution of the GDR amendment of 1974 Art. 73 (DDR-Gbl. I, p. 432); Uwe Wesel, *Ein Staat vor Gericht: Der Honecker- Prozess*, Frankfurt am Main: Eichborn Verlag (1994), 10-18.
[63] Berlin Regional Court, *Case of Schabowski, Kleiber and Krenz*, No. (527) 25/2 Js 20/92 Ks (1/95), judgment of 25 August 1997, para. 85, in: Marxen/Werle (eds.), *Strafjustiz und DDR-Unrecht* (2002), 645-890.
[64] Law on the Bordero f the German Democratic Republic, Border Protection Act (Gesetz über die Staatsgrenze der Deutschen Demokratischen Republik- Grenzgesetz), of 25 March 1982, (DDR-GBl. I, p.197).
[65] Berlin Regional Court, *Krenz*, judgment of 25 August 1997, paras. 37 et seq.
[66] Quint (1999), 306.
[67] *Ibid.;* Berlin Regional Court*, Streletz,* judgment of16 September 1993, paras. 34, 35.

member of the Political Bureau and the NDC from 1983 on and for a short time in the revolutionary days of 1989 he was the general secretary of the SED next to Erich Honecker, the SED party leader.[68] *Schabowski* was the editor of the SED party newsletter and the party leader in Berlin. He was a member of the Political Bureau from 1984 on.[69]

All defendants had high positions and were involved in the committee decisions on border protection of the Political Bureau in 1984 and 1987.[70]

3. The conviction of the defendants

The cases went through all judicial instances in Germany, from the Berlin Regional Court to the Federal Supreme Court up to the Federal Constitutional Court.

By a decision of the Berlin Regional Court *Streletz* was sentenced to five years and six months and *Kessler* to seven years and six months imprisonment for incitement to commit intentional homicide, on the ground that they shared responsibility for the deaths of seven people who were shot by attempting to flee across the border.[71]

The Berlin Regional Court first declared *Krenz* guilty of incitement for murder (Art. 22 § 2 (1) and 112 § 1 of the StGB-DDR). Then the court applied the criminal law of the FRG, as being more lenient than GDR´s criminal law and convicted him as an indirect principal in the intentional

[68] Federal Court of Berlin, *Krenz*, judgment of 25 August 1997, para. 6.
[69] *Ibid.* para. 5.
[70] *Ibid.* para. 90 et seq.
[71] Berlin Regional Court, *Streletz*, judgment of 16 September 1993, para. 3.

homicide (Art. 25 and 212 of the StGB).[72] *Krenz* were sentenced to six years and six months imprisonment. Due to the fact he participated in decisions of the Political Bureau and the NDC on the GDR`s border policing regime, he shared responsibility for the deaths of four people who had attempted to flee the GDR between 1984 and 1989. They were shot by East German border guards by crossing the border. The Berlin Regional Court convicted *Krenz, Schabowski* and *Kleiber* as indirect perpetrators and stated that they acted in joint commission through their participation in the decision of the Political Bureau.[73]

On appeal, the Federal Court of Justice, affirmed on every point the judgments of the Courts of the first instance and found the defendants guilty of indirect participation in homicide. It stated that killing of fugitives at the border contributed as arbitrary deprivation of life in violation of established international law.[74]

The Federal Constitutional Court upheld the convictions of all four applicants and stated that the prohibition of retroactive punishment determined in Art. 103 (2) of the FRG´s Basic Law is not violated because it does not refer to a state which never respected fundamental rights.[75]

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[72] Berlin Regional Court, *Krenz*, judgment of 25 August 1997, para 273, 275, 276.
[73] *Ibid.* para. 273.
[74] Federal Supreme Court, *Appeal of Schabowski, Kleiber and Krenz*, No: 5 StR 632/98, judgment of 8 November 1999, para. 51, (BGHSt 45, 270) in: Werle/Marxen (eds.) (2002), 891-910; *Appeal of Keßler, Streletz and Albrecht*, No. 5 StR 98/94, judgment of 26 July 1994, BGHSt 40, 218, in: Werle/Marxen (eds.)(2002), 599-608.
[75] Federal Constitutional Court, *Beschluss zur Nichtannahme der Verfassungsbeschwerde*, *Streletz*, No. 2 BvR 1875/94; 2 BvR 1852/94; 2 BvR 1853/94, 2 BvR 1875/94, decision of 24 October 1996 in: Werle/Marxen (eds.) (2002), 609-642.; *Krenz*, Az. 2 BvQ 60/99, 2 BvR 241/99, decision of 12 January 2000, in: Werle/Marxen (eds.) (2002), 911-914.

II. Legal issues

The courts had to resolve fundamental legal questions to convict the defendants. The applicable law had to be determined. Was it the law in East Germany, written in the statute books or the secret orders to kill fugitives at the border rather than to permit escape? Or should they follow the notions of morality to deal with the state injustice and with that assume at the same time that the previous rules of the GDR cannot be law? That led to the most controversial question: Does the prohibition of retroactive punishment apply if an unjust repressive system becomes a rule-of-law democracy?

1. Unification Treaty: Applicability of GDR law

Since the German judiciary decided to convict the perpetrators by using domestic law, they had to determine the applicable law. The question was whether to apply the FRG Criminal Code, which involved the risk to violate the prohibition of retroactive punishment, or apply the GDR Criminal Code and annul the principle of justice with that.

The Unification Treaty provided the binding legal framework for the accession of the GDR to the FRG in 1990 and made the criminal prosecutions possible.[76] The transitional provision of the Criminal Code (Art. 315 to 315 (c) of the Introductory Act to the Criminal Code) provided that the applicable law is in principle the law applicable in place where the offence was committed. That means for acts committed by citizens of the

[76] Unification Treaty of the Federal German Republic and the German Democratic Republic of 31 August 1990 (BGBl II, p. 889).

GDR inside the territory of the GDR, the applicable law is in principle the law of the GDR. Pursuant to § 2 (3) of the Criminal Code, the law of the FRG is applicable only if it is more lenient than GDR law. Thus, the courts were required to apply both, the old law of the GDR, and the new law of the FRG. Only if criminal liability could be determined under GDR law the second step, the application of FRG law, was possible.

The so called "two key approach" or "most favorable principle"[77] determined in the Unification Treaty provided only a broad framework for applying criminal law but did not provide more precise guidelines regarding the prohibition on retroactivity.[78]

This approach was a compromise and reflects the unwillingness of the FRG to incorporate the criminal law of the undemocratic GDR regime into its own legal order. It also reflects the intention of the GDR to ensure that its citizens would continue to be judged with the previous laws.[79]

2. Punishability under GDR law

a) Written and unwritten GDR law

First, the courts had to determine liability under GDR law. Art. 112 and 22 GDR Criminal Code criminalized homicide and incitement to commit homicide. But the killing of people trying to flee across the border was always seen as justified if the killing was committed as a last resort to prevent "fleeing the republic ". Art. 27 (2) State Protection Act permitted the use of firearms when needed to prevent the commission or

[77] "Meistbegünstigungsprinzip" Kristian Kühl, Karl Lackner, *Strafgesetzbuch, Kommentar*, 26th Edition, Munich: C. H. Beck (2007), § 2, 16 a.
[78] Werle/Vormbaum (2010, forthcoming), 28.
[79] Rudolf (2001), 905.

continuation of a “serious crime”. Art. 213 Criminal Code declared that illegally crossing the border constituted a “serious crime” if committed “by dangerous means or methods”. The GDR´s Supreme Court interpreted dangerous conditions as the use of instruments, such as a ladder or rope for crossing the border, or committing the “breach of the border” together with others.[80] Through that the impunity of the border guards was ensured. The interpretation of Art. 27 State Protection Act permitted the firing at fugitives who tried to flee across the border. The wording of Art. 27 (5) only says that “the life of persons is to be spared to the extent possible”. Within the practice of the law the border guards were given the suggestion that no escape was allowed and the “breach of the border” had to be prevented at all costs.[81] Thus, Art. 27 State Protection Act permitted the killing of fugitives. This notion was reflected in how the GDR dealt with the border guards who shot people at the border. There were no investigations, instead they were praised and rewarded by the superiors.[82]

As a result, the use of firearms was always considered to be justified. The killings at the border, as a form of state-organized violence were domestically legal. A conviction under GDR law would not have been possible.

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[80] Gemeinsamer Standpunkt des Obersten Gerichts und des Generalstaatsanwalts zur Anwendung des § 213 StGB, 15 January 1988, OG-Informationen Heft 2/1988, p. 9, 14.
[81] State Protection Act.
[82] Berlin Regional Court, *Mauerschützen*, No. (523) 2 Js 48/90 (9/91), judgment of 20 January 1992, translated in: Transnational Justice, Vol. 3: *Laws, Rulings and Reports*, Neil J. Kritz (ed.), Washington United States of Peace Institute Press, pp. 576-585 (1995), 578.

b) The approach of the courts

The German courts had to find a way to convict the defendants by applying GDR law. Not until they determined culpability under the law of the dissolved state they could apply FRG law as the most lenient one "in favour of the defendants."[83] The courts interpreted the GDR laws in a human rights friendly way to create culpability for the shootings at the Berlin Wall under GDR law. They applied "natural" law in accordance with international law to determine that the border guards had violated not only West German but also East German law, which then left no obstacles to conviction. By doing so the courts circumvented a violation of the prohibition on retroactive punishment.

3. Prohibition of retroactive punishment

a) The extent of the rule of law

The fact that the solely application of GDR law did not suffice to convict the defendants, the courts were confronted with the issue of retroactive punishment. In situations where the new democratic system has to prosecute human rights abuses which were committed under the protection of the old order, the judiciary has to prove that it acts within the rule of law. When leading figures of another legal system are the objectives of judicial assessments, the courts are in the dilemma of justice and formal law.[84] The judiciary has to respect and protect the elementary

[83] § 2 (3) FRG Criminal Code; Unification Treaty. With the mere application of GDR law without a human right friendly interpretation the defendants would have stayed unpunished. Thus, it seems ironically to apply FRG law for a more lenient punishment.
[84] Ruti Teitel, "Transitional Jurisprudence: The Role of Law in Political Transformation", *Yale Law Journal,* Vol. 106, pp. 2009-2080 (1996-1997) 2024, [Online]

principles of law against the exertion of political influence or members of the public. How the prohibition of retroactive punishment is used by a state determines to what extend the state under the rule of law is authorized to prosecute the injustice of the dictatorship.[85] Does the principle demand to pay attention to laws and a jurisprudence which violated human rights? Is the prosecution of the creators of the legalized human rights abuses a human right violation itself because the courts would then disregard the principle of the *Rechtsstaat*?[86]

b) The clash of two fundamental principles

The German courts had to consider the challenge between justice and statutory law. This led to a clash of two fundamental principles; the principle of *objective justice* and the principle of *nullum crimen sine lege*.

(1) Principle of Justice

The principle of *objective justice* (materielle Gerechtigkeit) demands that evil acts should be subjected to criminal punishment.[87] To kill someone in order to prevent that person from leaving the country is clearly an evil act. Although law actually exists to further justice, "law and justice are often not the same."[88] Quite the contrary, law can be created for the purpose to

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https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0044-0094 (accessed on 30 September 2010).

[85] Gerhard Werle, „Rückwirkungsverbot und Staatskriminalität", *Neue Juristische Wochenschrift,* 3001-3008 (2001), 3002.

[86] *Ibid.*

[87] Quint (1999), 310; Gabriel (1999), 397.

[88] Kif Augustine Adams, "What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards", *Stanford Journal of International Law*, Vol. 29, 271-314 (1993), 273.

work against justice. That was the case with the GDR laws which justified the shootings at the border.

(2) Principle of *nullum crimen sine lege*

The principle *of nullum crimen sine lege/ nulla peona* prohibits punishment if the conduct was not criminalized at the time of commission. It is required that criminal liability has to be legally defined before the act is committed. Thereby the citizens know how to behave and how to avoid committing a punishable offence.[89] The prohibition on retroactive punishment seeks to protect legitimate confidence and intends to protect the individual against state action.[90] It is not only a central principle of jurisprudence, it is also explicitly written in Art. 103 (2) Basic Law which states that "an act can only be punished if its criminality was determined by law before the act was committed." This article is an expression of the rule of law and it is fundamental to protect the trust of the citizens.[91] This principle was also reflected in the Unification Treaty which stated that criminal liability must also be found in the law of the dissolved state. Art. 7 (1) of the European Convention on Human Rights protects the principle of *nullum crimen sine lege* as well.

The former rulers, who systematically violated human rights before, referred to the prohibition on retroactive punishment when they were put on trial.[92] “What was law yesterday cannot be injustice today” has been said by the defendant *Krenz* and meant that the fundamental principle of

[89] Federal Constitutional Court, *Streletz*, decision of 24 October 1996, para. 47.
[90] Werle (1996), 22.
[91] Rudolf (2001), 906.
[92] Werle (2001), 3001.

the rule of law does prohibit to prosecute what was not punishable under the old order.[93] The German courts did not let the leaders shield behind that principle in order to stay unpunished.

(3) Solution by the courts: principle of proportionality reflected in GDR law

The courts wanted to bring the two fundamental principles in line, instead of rejecting the GDR laws.

Although the Border Protection Act, the GDR Criminal Code and the practice in the GDR allowed the killings at the border, the courts stated that the shootings were not justified under GDR law.[94] These laws had to be seen in the context of the GDR Constitution which protected human rights. Art. 30 GDR Constitution granted its citizens protection of life, physical integrity and health. The use of firearms to hinder fugitives from crossing the border has stood in contravention to it.[95] From this, the courts deduced that the government was bound to be guided strictly by the principle of proportionality.[96] The courts interpreted the GDR laws by consulting the FGR law and the jurisprudence of the Federal Supreme and Constitutional Court. They held that basic principles of human behaviour and the individuals´ right to life must be protected. The freedom of a state to determine what is lawful and unlawful was not unlimited when it comes

[93] Krenz' closing words in the appeals trial at the Federal Supreme Court. Reinhard Müller, „Schießbefehl: Selbst nach DDR recht verboten", *Frankfurter Allgemeine Zeitung*, (14 August 2007) [Online] http://www.faz.net/s/Rub594835B672714A1DB1A121534F010EE1/Doc~ECEB2853DD7C44D04A87B76E579BBCBB0~ATpl~Ecommon~Scontent.html (accessed on 12 October 2010).
[94] Federal Constitutional Court, *Streletz*, decision of 24 October 1996, para. 50.
[95] Berlin Regional Court, *Mauerschützen*, decision of 20 January 1992, *Laws, Rulings and Reports*, 578.
[96] *Ibid.*

to a violation of the core area of basic principles of human behaviour. Intentionally killing of a person was a violation of the fundamental principle of law and of humanness.[97] The border guards and all the more the leaders must have been able to recognize the few basic principles that are indispensible for human coexistence and therefore they must have known that their conduct was unjust.[98] Thus, the State Protection Act and the orders given by the leaders could not serve as a justification.[99]

The Federal Constitutional Court stated that Art. 103 (1) Basic Law and Art. 7 European Convention on Human Rights do not hinder punishment.[100] The courts held that Art. 7 (2) European Convention on Human Rights expressly recognizes that the *nullum crimen* principle cannot be used as a shield for human rights violators. The limitation on the provision against retroactive legislation states that this prohibition may not preclude punishment of an individual who culpably committed an act which was criminally punishable at the time of its commission according to general principles of law recognized by civilized nations.[101] The trust in the laws at the time of the offence did not deserve protection because the GDR never practised democracy and the separation of powers and it did not respect human rights. The decisions of the defendants which led to the shootings at the border were grave breaches of internationally recognized human rights.[102] A justification of them would be contrary "objective

[97] *Ibid.* 578, 579.
[98] *Ibid.* 581.
[99] *Ibid.*; Berlin Regional Court, *Streletz*, judgment of 16 September 1993, paras. 222 et seq.; Berlin Regional Court, *Krenz*, judgment 25 August 1997, paras. 271-273.
[100] Federal Constitutional Court, *Krenz*, decision of 12 January 2000.
[101] Federal Constitutional Court, *Streletz*, decision of 24 October 1996, paras. 49, 50.
[102] Berlin Regional Court, *Krenz*, judgment of 25 August 1997, para. 272.

justice." The statutory law created by the lawmakers of the GDR was unjust to such an extreme extent that it can only exist as long as the responsible apparatus of power exists.[103]

The Federal Constitutional Court held that previous positive law is intolerable where it is inconsistent with justice.[104] In consequence, the courts weighted the basic principle of material justice and basic moral rules more highly than the principle of legal certainty. Accordingly, the principles were brought in line with each other without dismissing the ban of retroactivity as such.

4. Human rights friendly interpretation of East German law

a) Radbrusch`s formula - natural law

The German courts applied International human rights standards and used "positivist" and "natural" law arguments to annual the GDR law.[105] They stated that the GDR`s border policing regime "flagrantly and intolerably infringed elementary precepts of justice and human rights protected under international law."[106] The "deadly shots along the border were a crass injustice and they were in crying contradiction with the generally recognized basic principles of law and justice."[107]

The Federal Constitutional Court already recognized in two decisions of 1953 and 1957 the basic principle that laws, which interfere in "the core

[103] Federal Constitutional Court, *Streletz*, decision of 24 October 1996, para. 50.
[104] *Ibid.*
[105] In detail Adams (1993).
[106] Berlin Regional Court, *Krenz*, judgment of 25 August 1997, paras. 271, 272; quoted and translated in: ECHR, *Case of Streletz, Kessler and Krenz v.Germany*, judgment of 22 March 2001, para. 19.
[107] Berlin Regional Court, *Mauerschützen*, judgment of 20 January 1992, in: *Laws, Rulings and Reports*, 583.

area of the law, are null and void."[108] The Court stated the following: "It was especially the time of the National Socialist regime in Germany that taught us that the legislator can also legislate injustice, in other words, if practical legal usage is not to stand defenceless against such historically thinkable developments, there must be a possibility, in extreme cases, to evaluate the basic principle of material injustice more highly than the principle of legal certainty, such as it is expressed in the applicability of positive law routine cases." As a criterion for the existence of such a special case, the Federal Constitutional Court points to the formulation by *Gustav Radbruch*. Such a case does exists when the contradiction between positive law and justice has reached such an unbearable degree that the law must yield to justice since it is "incorrect law".[109]

The courts compared the communist laws to those of the Nazi period and applied the formula of "statutory injustice" in the border guard cases. They stated that the orders and regulations of the superiors given to the border guards did not deserve any respect and that the border guards might refuse to obey them.[110] Thus, GDR state practice with and Art. 27 Border Protection Act could not be used as a defence.[111]

b) International law - positive law

The courts stated that the killings at the border were an arbitrary deprivation of life in violation of international law. The border policing

[108] Federal Constitutional Court, BVerfG 3/232; 6/199.
[109] Gustav Radbruch, „Gesetzliches Unrecht und übergesetzliches Recht"; *Sueddeutsche Juristenzeitung*, (1946), 105.
[110] Berlin Regional Court, *Mauerschützen*, judgment of 20 January 1992, in: *Law, Rulings and Reports*, 579, 580.
[111] Federal Constitutional Court, *Streletz*, decision of 24 October 1996, para. 50.

regime put "the prohibition of crossing the border above the right to life" which violated internationally protected principles of justice and human rights. The courts referred to the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the Universal Declaration of Human Rights.[112] The GDR incorporated international law in its constitution and criminal code as valid domestic law to be applied within the GDR territory.[113] Art. 8 (1) GDR Constitution provided that the "generally accepted rules of international law serving peace and international cooperation are binding upon the state and every citizen." Even if the GDR did not implement it in its domestic law the fundamental principle of freedom to leave the country was binding. Thus the GDR violated known requirements of international law. [114]

5. The notion of indirect perpetration: The "perpetrator behind the perpetrator"

a) Term and development

After the Nuremberg trials it was recognized that both, the leaders and the soldiers are potentially responsible for state wrongdoings under international law.[115] However, the rules on modes of criminal participation

[112] ECHR, *Streletz, Kessler and Krenz v.Germany,* judgment of 22 March 2001, para. 22; ICCPR entered into force for both German states on 23 March 1976.
[113] Adams (1993), 286.
[114] *Ibid.*
[115] The Nazi superiors were held responsible as co-conspirators in the waging of aggressive wars under Art. 6 IMT Charter; International Military Tribunal, judgment of , 251; see Ilias Banktekas/ Susan Nash, *International Criminal Law*, 3rd Edition, London: Routledge Cavendish (2007), 504.

were rudimentary and some were directly included in the definitions of the crimes of the Nuremberg Charter.[116]

Since then there was no concept to address responsibility along a power echelon. Due to the collective nature of mass atrocity crimes, individual responsibility for the particular contributions had to be established. The question arose as to what extent superiors and subordinates could be held responsible and if they both could be held liable as principals if they act on different levels with knowledge and intent of the circumstances. The notion of the "perpetrator through another person" was developed in domestic law, confirmed through courts, later on applied by the International Military Tribunals and finally adopted by the International Criminal Court in the Rome Statute.

The concept of indirect perpetration through the control over the will of a culpable direct perpetrator was first applied in the *Eichmann* Trial in 1961.

Hanna Arendt used the term "cog in the machine" for the soldiers used by the Nazi leaders to execute their orders.[117] The District Court of Jerusalem articulated in the *Eichmann* Trial that "the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach higher ranks of command."[118]

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[116] Art. 6 IMT Charter: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan". See also Antonio Cassese, *International Criminal Law*, 2nd Edition, New York: University Press (2008), 187.

[117] Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil,* 4th Edition, London: Penguin Books (2009), 57, 132.

[118] Jerusalem District Court, *The Attorney General v. Eichmann*, Case No. 40/61, I.L.R. 5-14, 18-276, judgment of 12 December 1961.

Probably inspired by this the German jurist *Claus Roxin* evaluated in 1963 the so called "domination over an organizational apparatus" (Organisationsherrschaft) doctrine, to hold indirect perpetrators liable even if the direct perpetrator is not innocent.[119]

To this time according to § 25 I second alternative German Criminal Code, "perpetration through another person" could only be committed by an indirect perpetrator who uses an innocent agent as a "human tool".[120] The "mastermind" (the person behind the perpetrator) could not hold liable as a principal if the direct perpetrator completely controlled the act and the situation, both factually and legally, and also wants to exercise that control.[121] Thus, if the direct perpetrator was culpable, the indirect perpetrator could only be held accountable as an instigator or assistant. In German law the distinction between principals and accessories is based on the theory of control over the crime, the "hegemony over the act" (Tatherrschaft).[122] Given the innocent direct perpetrator has because of his "defect" no actual control over the crime, the indirect perpetrator is culpable as a principal.[123]

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[119] Mark Osiel, "Mass Atrocity Through Hierarchical Organization: The ICC's Recent Jurisprudence", Cambridge: Cambridge University Press (2009, forthcoming); Claus Roxin, Straftaten im Rahmen organisatorischer Machtapparate, Goltdammer´s Archiv für Strafrecht (1963), 193 et seq.; Claus Roxin, *Täterschaft und Tatherrschaft,* Berlin: de Gruyter (2006), 249 et seq.

[120] see Rudolf Rengier, *Strafrecht AT,* München: Verlag C.H. Beck (2009), § 20 III 2.1.; Johannes Wessels/Werner Beulke, *Strafrecht AT*,3rd Edition, Berlin Heidelberg: C.F. Müller Verlag (2005) § 13 III 3; Roxin (2006) 242-270.

[121] Michael Bohlander, *Principles of German Criminal Law*, Oxford: Hart Publishing (2009), 159.

[122] Adolf, Schönke/ Horst, Schröder, *Kommentar zum Strafgesetzbuch,* 27th Edition, München: Verlag C.H. Beck (2006) Vorbem. §25 Rn 71.

[123] see Rengier(2009), § 20 III 2.1.; Wessels/Beulke (2005) § 13 III 3; Roxin (2006) 242-270.

Roxin argues that within his concept of *Organisationsherrschaft* both the indirect and the direct perpetrator have control over the crime. The indirect perpetrator acts through the criminally responsible direct perpetrator due to his dominating power over a hierarchical organization. Coercive measures and deception are not required because the indirect perpetrator can be sure that his order will be executed almost automatically by a member of the organization. Due to the fact that the perpetrator behind the perpetrator does not care who physically carries out the offence, he must not only have the intention to commit the crime, he also must fulfil the objective criteria.[124] Thus, he needs to have control over the act. The element of the "hegemony over the act" is according to *Roxin* the "fungibility" of the perpetrator who executes the offence. The individual person who executes the offence directly does not count, since he is "fungible", thus, replaceable any time. The indirect perpetrator dominates the system and "the anonymous will of all the men who constitute it".[125] The organization develops a life that is independent of the changing composition of its members. Another precondition was that the apparatus of power of which the indirect perpetrator made use was detached from the system of law.[126]

The requirements in German law for "perpetration-by-means" can be summarized as follows: (1) The indirect perpetrator must exercise effective control over the organization, (2) which is characterized by its fungibility of

[124] Roxin (2006), 245; see also Kai Ambos, "Individual Criminal Responsibility", in: G.K. McDonalds and O. Swaak-Goldmann (eds.), *Substantive and Procedural Aspects of International Criminal Law,* Vol. 1, The Hague: Kluwer Law International, 1-31 (2000).
[125] Ambos (2000), 19.
[126] Roxin (1963), 200.

its members. (3) Within this structure the crimes are carried out automatically. (4) The indirect perpetrator must be aware of his power and must have the will to control the organization. (5) The indirect perpetrator must fulfil the *mens rea* and all (6) personal qualities with regard to the material elements of the crime committed.[127]

This mode of participation closes legal gaps. The mere punishment for instigation or aiding and abetting, which are modes of participation on the second level, do not have the same impact. The intention of instigation is different because the instigator has not the act as such in his hand.[128] The "perpetrator behind the perpetrator" has more influence and determines the executive person through the hierarchical structure.

a) Application in the border guard general trials

This concept was affirmed by the German courts in the border guard general cases and therefore found its way into the jurisprudence. The guards themselves were held criminally accountable for their own actions at the border.[129] The leaders were held responsible as indirect principals in co-perpetration under § 25 and § 212 StGB on the ground that they had been members of the National Defence Council and the Political Bureau and they had known that their orders would be obeyed.[130]

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[127] Jessberger/Genuess (2008), 861.

[128] Schönke/Schröder (2006), § 26; Bohlander (2009), 154, 155, 167. In German Criminal Law the punishment for instigation or aiding and abetting is lower than for committing the crime as a principal.

[129] Berlin Regional Court, *Mauerschützen*, No. (523) 2 Js 48/90 (9/91), judgment of 20 January 1992. They were convicted for homicide and sentenced up to three years imprisonment.

[130] Berlin Regional Court, *Krenz*, judgment of 25 August 1997, para. 275

The Federal Supreme Court set out the principles for liability of superiors in a hierarchical structure based on the legal principle of "control over the act". If the full responsible direct perpetrator acted based on a contribution by the "mastermind" (Hintermann), which almost automatically led to the crime intended by him, the indirect perpetrator acted as a principal as well. The person behind the direct perpetrator "uses the framework conditions prevalent in certain organisational power structures or hierarchies within which his actions regularly set in motion certain trains of events."[131] The courts acknowledged that those frameworks with regulatory actions exist particularly within organised structures of the state and chains of command. "If the *Hintermann* knowingly utilises these circumstances, especially if he exploits the unreserved preparedness of his subordinate to commit the offence as such, then he will have control over the act and as such be liable as a principal by proxy."[132] The indirect perpetrator "possesses the overriding will to control the act and he knows that the framework conditions make any resistance of the direct perpetrator to his plans highly unlikely. To treat the *Hintermann* as a mere secondary participant and not as a principal would not do justice to the importance of this contribution."[133]

To prove the control exercised by the defendants, the Berlin Regional Court comprehensively scrutinized the successive instructions which were given from the men at the top down to the subordinates. The committee

[131] Berlin Regional Court, *Krenz*, judgment of 25 August 1997, para. 275, translated by Bohlander (2009), 159.
[132] *Ibid.* paras. 275, 276; translated by Bohlander (2009), 159; Federal Supreme Court, *Streletz*, judgment of 26 July 1994, 27 et seq.
[133] *Ibid.*

decisions of the Political Bureau and the National Defence Council in which the defendants participated went on to the military chain of command. Those gave the orders to the border guards who then shot at the fugitives.[134] The convictions of the GDR officials for homicide committed as principals were an important signal. The single deaths at the border were addressed to the leaders at the top whose decisions caused the killings. This shows the entire mechanism of the repressive structure.

6. Criticism and assessment of the judgments

The German courts avoided to make an exception of the principle of *nullum crimen sine lege*. They protected a legal principle formally but at the same time they violated it practically. By interpreting previous positive laws they created a new law. A conviction for homicide by the application of FGR law would have retroactively dismissed the positive law of the GDR. However, upholding previous positive laws for the purpose of avoiding the violation of the principle on retroactive punishment means protecting murderers´ reliance on the repressive communist law. The prohibition on retroactive punishment is a fundamental principle which was created for the situation appearing under a *Rechtsstaat*.[135] A state governed by a substantive rule of law principle which includes the protection of human rights.[136] A system can rely on its laws, even if it ceases to exist, if it was governed by the rule of law and respected human rights.[137] When it comes to human rights abuses, that principle should not

[134] *Ibid.* paras. 15-138.
[135] Gabriel (1999), 410.
[136] Werle (1996), 22, 28.
[137] Rudolf (2001), 909.

play a role. The GDR regime cannot be assessed as a *Rechtsstaat* because it obviously infringed the right to life and the right to leave.[138] The East German law justified the shootings at the border. The leaders of the GDR enacted and maintained the laws and therefore practiced institutional injustice. Nobody would ever doubt that killing people who tried to escape from a repressive system to a democratic system is not homicide. Consequently nobody would ever doubt that this crime should be punishable. Thus, the German courts should have dismissed the previous GDR laws totally instead of interpreting them. The East German citizens who lived under the rules and laws for more than 40 years then had to accept that their legal system as a breach of human rights as such. Even if this could have led to lack of understanding in the East German society, it would have been a clear statement that unjust statutory law, which violated internationally recognized human rights, is not a basis to rely on and cannot have an impact after the collapse of the GDR.

The interpretation of the GDR law did not reflect the practice within the suppressive state. With the interpretation in favour of human rights the courts assumed that these laws were misunderstood by those who applied and relied on them.[139] The leadership of the GDR would never have

[138] The GDR did not fulfil the requirements for a state under the rule of law. There was not a division of powers and civil rights were restricted. Gabriel (1999), 410; for the discussion about the „Unrechtsstaat DDR" see Rudolf Wassermann, „Wieviel Unrecht macht einen Staat zum Unrechtsstaat?", *Neue Juristische Wochenschrift (*1997) 2152 et. seq. This is still a controversial issue. Recently, the former GDR politician and presidential candidate Luc Joachimsen refused it to qualify the GDR as an illegitimate state. *Spiegel Online*, "Linke-Kandidatin Jochimsen will DDR nicht Unrechtsstaat nennen" (16 June 2010), [Online] 16.06.2010 http://www.spiegel.de/politik/deutschland/0,1518,701148,00.html (accessed on 22 June 2010).

[139] Werle (1996), 28, 29.

interpreted their own laws in the way the German courts did.[140] If the leadership were really bound to an interpretation that values human rights the GDR would then have had another identity.[141]

The approach of the courts demonstrates that unified Germany was quite unsure about how far they could stretch the law. That surprised, since Germany made this experience before when it put on trail former Nazi-leaders after World War II.[142] Here as well, the courts did not dare to make a clear statement that law in violation of human rights is not applicable when it comes to criminal prosecutions of crimes committed under the old regime. The courts were not able or unwilling to name the application of ex-post facto laws. They accepted the prohibition on retroactive punishment but through their interpretation of the previous law they simultaneously applied ex-post facto law.

If the principle of *nullum crimen sine lege* is to be used from a state to protect murders reliance on law which obviously violated human rights, a state governed by the rule of law and maintaining and protecting the *Rechtsstaats* principle is justified in not paying attention to it.[143] The prohibition should not function as a protective shield for a dictatorship and its murders.[144]

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[140] Quint (1999) 312; Werle (1996), 29.
[141] *Ibid.,* see also Silke Laskowski, "Unrecht-Strafrecht-Gerechtigkeit: Die Probleme des Rechtsstaats mit dem DDR-Unrecht," *Juristische Arbeitsblätter*, 26 (1994) 161.
[142] Werle (2001), 3003.
[143] Werle (1996), 22, 30; Wolfgang Naucke, „Die strafjuristische Privilegierung staatsverstärkter Kriminalität“, *Juristische Abhandlungen*, Band 29, Frankfurt am Main: Klostermann, (1996). 47 et seq; Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation”, *Yale Law Journal*, Vol. 106, 2009-2080 (1996-1997), 2024.
[144] *Ibid.,* Gabriel (1999), 411.

Retrospective justice also involves a significant risk.[145] Retroactive punishment justified through human rights can be politically abused. Rejecting previous laws under the guise of human rights might be used by the governments as an exercise of power. It can also be used by governments to "designate scapegoats"[146] with the goal to justify their policy. As the author *Brad Roth* puts it, the "shield of human rights" should not be used as a "sword".[147] The prosecuting state has to examine carefully if it can apply retroactive laws to avoid arbitrary results. In the border guard cases it was imposing that Art. 27 Border Protection Act violated human rights.

Nevertheless, the application of previous statutory law can also strengthen the effect of the criminal justice process. The perpetrators can identify themselves with their conviction if they violate not only international law but also their previous statutory law.[148]

Germany preferred the compromise approach to please the GDR citizens who relied on the previous law and those who believed in the democratic law of the new state.

Ruti Teitel states that the border guard cases "illustrate the dilemmas implied in the attempt to effect substantial political change through and within the law," but the cases also involve "weighty symbols of freedom

[145] MacAdams (2001), 259; Brad R. Roth, „Retrospective Justice or Retroactive Standards? Human Rights as a Sword in the East German Leaders Case", *Wayne Law Review*, Vol. 50, 37-68 (2004), 66.
[146] Roth (2004), 66.
[147] *Ibid*. 67.
[148] Werle (2001), 3008.

and repression."[149] The conviction of the border guard officials sent an important message that the new regime would be more liberal than its predecessor.[150]

Despite all criticism the German courts found a correct result.[151] The courts weighted morality higher than the validity of previous human rights violating laws. They understood justice not as equal enforcement of the law but as the highest goods of a rule of law in a state of the rule of law. [152] The decisions condemned the shootings at the Wall and rehabilitated the East Germans sense of justice and law due to the fact that they emphasize the rule of law.[153] They underlined the injustices of the communist system which refused its citizens the freedom to leave the country although it was granted in the GDR constitution. They aided the German process of coming to terms with the past.[154]

Furthermore, the German courts did not only address liability for those responsible for the crucial behaviour. They also remembered victims who died at the border and stand for the other GDR citizens who wanted to flee but were deterred because they feared being shot at the border.[155]

[149] Teitel, (1997), 2022.
[150] *Ibid*. 2023.
[151] Werle (1996), 31.
[152] Teitel (1997), 2024.
[153] Some people criticized the strict binding to the rule of law. "We expected justice, but we got the *Rechtsstaat* instead." Bärbel Bohley, cited in Andreas Zielcke, "Der Kälteschock des Rechtsstaates" *Frankfurter Allgemeine Zeitung* (9 November 1991); MacAdams (1997), 240.
[154] Gabriel (1999), 375.
[155] Quint (1999), 327.

7. Judgment of the European Court of Human Rights

The judgment of the ECHR on the 22 March 2001 was the essential legal final point of the criminal prosecution of the GRD system. The court stated that the former Political Bureau and NDC members were guilty of human rights violations and not the judiciary of the FGR which has prosecuted those human rights violations.[156]

1. Statement to the German judgements

The ECHR held that the convictions of the former GDR leaders for ordering to kill fugitives attempting to flee the GDR compatible with the principle *nullum crimen sine lege* and consequently with the prohibition on retroactive criminal laws under the European Convention on Human Rights.[157]

The ECHR stated that term "law" in Art. 7 (1) of the European Convention means, that written and unwritten law must be considered to find out whether the conduct of the leadership officials were criminal under GDR law.[158] The acts have violated written law because the GDR Constitution, the People's Police Act and the Border Protection Act had the "principle of proportionality" inherent.[159] The practice of the GDR state organs has been limited by the "human rights" protecting GDR Constitution as well.[160]

The orders given by the leadership officials were such a flagrantly violation of the GDR Constitution and the ICCPR that the state practice could not

[156] Rautenberg (2003), 97-130.
[157] ECHR, *Streletz, Kessler and Krenz v.Germany*, judgment of 22 March 2001.
[158] *Ibid*. para. 57.
[159] *Ibid*. para. 63.
[160] *Ibid*. paras. 67-76.

serve as a ground of justification. That the state practice was kept secret showed that the officials knew their orders were unjust.[161] Due to the "broad divide between the GDR's legislation and its practice" it must have been foreseeable for them that their superimposed provisions and secret orders constituted criminal offences.[162] The border-policing policy made by the leadership could not be described as "law" within the meaning of Art. 7 of the European Convention.[163]

Thus, the ECHR limited the full protection by the principle of *nullum crimen sine lege* to laws enacted by the state governed by the rule of law.[164]

The most important statement was that "it is legitimate for a state governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime." Therefore Germany was entitled to apply and interpret "the legal provision in force at the material time in the light of the principles governing a State subject to the rule of law." [165] The ECHR also stressed that the German courts were correct to assume that the acts constituted offences in contravention of international law at the time they were committed. The GDR had been under obligation to protect the human right to life and the right to leave the country.[166]

[161] I*bid*. paras. 67-76, 79.
[162] Ibid. 78.
[163] Ibid. 87.
[164] Rudolf (2001), 909.
[165] ECHR, *Streletz, Kessler and Krenz v.Germany,* judgment of 22 March 2001, para. 81.
[166] *Ibid.* paras. 91-104; the GDR ratified the ICCPR and Universal Declaration of Human Rights of 10 December 1948 in 1974.

b) Assessment of the decision

The ECHR also interpreted the GDR's Constitution, statutes and treaties and thereby took them seriously. Like the German courts they disregarded that the practice in the GDR was unjust at all and not interpretable in a human rights friendly way. The statutes and provisions in the GDR were directed to commit inhuman acts with the cover of legality. By ascribing them a human rights protective understanding the Court misrepresent the unjust GDR regime *(Unrechtsregime)* and in the course of this a new law was created.[167] By assessing that the term "law" in Art. 7 European Convention on Human Rights does not cover the arbitrary practice of the GDR, the Court refused that law has to be understood as a mere system of de facto rules. However, the Court thereby underlined the individual responsibility, because then one cannot shield behind orders and acts of others which pretend to be state practice.[168]

c) Decision with regard to national courts

The judgment is not only of high importance because it confirms that the criminal prosecutions of the GDR injustices are compatible with internationally recognized human rights. The decision of the ECHR is pointing the way for other states which are confronted with the legacy of gross human rights violations after the transition to democracy.[169]

The ECHR and the German judgments demonstrate the four approaches states can take to prosecute past human rights abuses: using the previous

[167] Rudolf (2001), 909.
[168] Rudolf (2001), 909.
[169] Werle (2001), 3006.

statutory law; refusing it and applying the law of the new or prosecuting state; applying international law; or the approach which involves the biggest compromise, the interpreting of previous law in a human rights friendly way.

The permission to interpret previous positive laws involves advantages but at the same time disadvantages and risks for states which face the dilemma Germany did.

In the German, and now as well in European legal practice, the interpretation of previous positive laws in a human rights friendly way can serve as an effective tool to justify prosecutions of crimes committed under previous statutory law.[170] Due to the fact that most dictatorships try to shield their injustices behind a human rights friendly façade, there are always links to interpret the repressive laws.[171]

It is a gateway for humanitarian law and in the same token the principle of the prohibition on retroactive punishment stays stable. Even if it is not about an international crime (war crime, crimes against humanity or genocide) an arbitrary killing arranged by the state would be punishable under international law.[172]

This is an extensive approach which also involves risks. Whenever a state wants to prosecute but is actually hindered by previous statutory law, it could open the door to international law and interpret those laws for making them suitable. Human rights abusive rules become thereby human

[170] *Ibid*. 3005.
[171] *Ibid.* 3007.
[172] *Ibid.* 3008.

rights protecting. That creates a new law which ironically denies the reality. The human rights violating dictatorship turns into a human rights friendly dictatorship. The result of the interpretation would not correspond to the positive law which was actually valid. The former leadership definitely would not have applied the laws with the meaning the courts give them afterwards. Quite the contrary, they enacted suppressive laws and orders to deliberately circumvent observing fundamental human rights.

Instead of interpreting the previous laws in an international sense, the courts could have categorized the crimes at the inner-German border as crimes against humanity and thereby punish them under international law.[173] International criminal law, German criminal law and the European Convention on Human Rights have the same principles: The prohibition on retroactive punishment protects citizens of a suppressive state but cannot shield leaders who violate human rights. Thus, human rights take precedence over the sovereignty of a state.[174] The judiciary of a democratic state under the rule of law should be free to refuse the applicability of previous human rights abusive laws.

d) Possibility to prosecute on the international level

Seen from today's perspective the orders of the previous GDR leadership could be prosecuted under international criminal law, if one would classify

[173] *Ibid*.; see also concurring opinion of judge Loucaides. With referring to the IMT Charter and Art. 7 ICC Statute he stated that the crimes at the inner-German border were "crimes against humanity" and therefore punishable under international positive law, ECHR, *Streletz, Kessler and Krenz v.Germany*, judgment of 22 March 2001.
[174] Werle (2001), 3008.

them as crimes against humanity.[175] The license to kill given by the political leadership and executed by their subordinate soldiers could constitute a widespread or systematic attack on a civilian population. When it comes to international crimes there is no more need of a limitation, circumvention or even a violation of the prohibition of retroactive punishment. In the case a state do not prosecute human rights abuses which effects the international community as a whole, international criminal law comes into play.[176] The ICC Statute provides the basis to convict perpetrators for their wrongdoings even if their conduct was permitted by national laws. However, the principle of *nullum crimen, nullum poena sine lege* is also acknowledged in customary international law. Art. 22 to Art. 24 ICC Statute set out the principle of legality but its standards are less strict than in German or European law.[177] A conduct is only criminal if it fits under the definition of Art. 5 ICC Statute at the time of its commission.[178] The International Criminal Court may prosecute offences occurred from 1 July 2002 on, the day the ICC Statute entered into force.[179]

Even after the establishment of the International Criminal Court, the indirect enforcement of international criminal law through national courts is of utmost importance.[180] States emerging from a dictatorial regime to a

[175] On the international crime „crime against humanity" see Werle (2009), paras. 778-927.
[176] On the duty to prosecute see *Ibid.* paras. 192-196.
[177] *Ibid.* para. 104.
[178] *Ibid*. para. 108; Cassese (2008), 44.
[179] See Art. 11, 24 and 126 ICC Statute.
[180] Gerhard Werle, Florian Jessberger, "International Criminal Justice is coming home: The new German Code of crimes against international law", *Criminal Law Forum,* Vol. 13, 191-223 (2002) 194.

rule of law democracy should decide to prosecute the past abuses to set a signal for other states.

Chapter 4: Impact and development with regard to international criminal law

I. International reaction on the German judgments

The border guard trials were discussed controversial worldwide. A reason therefore was that the other East European countries based their change of system after collapse of the Soviet Union to a large extent on amnesties.[181] Probably the new Eastern democracies had no other choice because resolving the past with choosing to prosecute the state injustices, could have meant a threat for the process of democratization. Furthermore, the required unbiased jurists were not available.[182]

An American scholar emphasized the important purpose of such trials. He saw the unprecedented institutional advantages in coming to terms with the crimes and abuses of the former GDR in comparison with other previous communist states, such as Czecheslovakia, Poland and Hungary. Due to the fact that West Germany was a state of law for over forty years the jurisprudence were seen as an excellent precedent for dealing the guilt of GDR's representatives.[183]

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[181] On the Hungarian approach see: Gábor Halmai, Kim Lane Schepple, "Living Well is the Best Revenge: The Hungarian Approach to Judging the Past", in: McAdams, James A. (ed.), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame: University of Notre Dame Press (1997), 155-184.
[182] Rautenberg (2003), 100.
[183] See McAdams (1997), 240; Adams (1993) 271-314.

Others stressed the violation of the rule of law by the German courts. Even if the East German law was a violation of international law, the guards should not have been convicted. The soldiers and the officials did not violate the East German law so their actions were legal.[184]

II. Application of the principle of "perpetration through another person" in other states

The notion of "perpetration through another person" is recognized in civil- and common law countries.

The doctrine of the "innocent agency" is determined in Spain in Art. 28 Spanish Código Penal. The Polish Criminal Code regulates it in Art. 18 § 1. In France this form of liability is not codified but recognized in case law.[185] Anglo-American law also applies the classical doctrine (Model Penal Code § 2.06). The "Black´s law dictionary" defines perpetration as "the act of one committing a crime either with his own hands, or by some means or instruments or through some innocent agent".[186] The intermediary who executes the objective elements of the crime is not

[184] Adrienne M. Quill, "Comment, To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia, and the Czech Republic", *Indiana International & Comparative Law Review*, Vol. 7, 165 (1996), 191; Gabriel (1999), 378.

[185] Ambos, *Der Allgemeine Teil des Völkerstrafrechts*, Berlin: Duncker und Humblot (2002), paras. 568 et seq.; Florian Jessberger, Julia Geneuss, "Recent Steps of the ICC Prosecutor in the Darfur Situation: Prosecutor v. President, On the application of a theory of indirect perpetration in Al Bashir, German Doctrine in The Hague", *Journal of International Criminal Justice*, Vol. 6, pp. 853-869, (November 2008), 857; Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", *Journal of International Justice*, Vol. 5, pp. 953-974 (2007), 963.

[186] Black´s Law Dictionary, 6th Edition, St. Paul, Minnesota: West Publishing (1990), 273; Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague: TMC Asser Press (2003), 69.

culpable because he either acts erroneously, is subjected to coercion, is of minor age or otherwise excused.[187]

The Dutch concept of functional perpetration is not limited to innocent agents culpable agents can also be used as means by the perpetrator.[188]

III. Foreign trials which faced the same challenges

1. The military junta trials in Argentina

The trials against the military junta in Argentina also were confronted with the questions which law should be applied, how far down the chain the prosecutions should reach and how to convict the leadership officials for their cruel orders.

Those responsible for the prosecutions had to decide whether to prosecute the defendants for their human rights violations in the manner of Nuremberg by applying international criminal law or to use the national law like the German judiciary did.[189] They chose to apply domestic law which involved the same problem as the German courts had. The Argentine authorities made the cases against their former dictators on the basis of acts that were criminal at the time they were performed. Thus they also faced the "problem of retrospective lawmaking".[190] The notion of "perpetration-by-means" influenced the trials. The Appeals Court held the "chair of command" responsible on the basis of their control over the organization. It determined that the "mechanisation" of the hierarchical

[187] van Sliedregt (2003), 68.
[188] Article 47 (1) Dutch Penal Code, v. Sliedregt (2003), 70.
[189] MacAdams (1997), 259.
[190] *Ibid.*

structure ensured that the plan was successfully executed, even if any particular subordinate failed to comply with an order. [191]

2. The Alberto Fujimori case of Peru

The recent conviction of the former President of Peru Alberto Fujimori demonstrates the influence of the German doctrine of the "perpetrator behind the perpetrator" on international case law.

On 7 April 2009 the Supreme Court of Peru convicted him to 25 years imprisonment for homicide, bodily injury and kidnapping in numerous cases. [192] His appeal was rejected on 3 January 2010.[193] During his period of office from 1990 to 2000 he used his death squads to suppress his opponents. For that he was found guilty as "an indirect perpetrator through control over the will of another person in an organized hierarchical apparatus."[194] The Supreme Court addressed responsibility according to Article 23 of the Criminal Code of Peru, which recognizes perpetration by means in the following language: "Any person who carries out the punishable act, by himself or through another, and those who commit it

[191] Federal Appeals Chamber of Argentina, *The Juntas Trial,* Case No. 1/84, judgment of 9 December 1985, in: *Human Rights Journal,* Vol. 8 (1987), 368 et seq. In 1986 the Supreme Court of Argentina overturned the decision: Case No. 13/84, judgment of 30 December 1986, *Fallos Corte de Justicia* 309, 1689 et seq.

[192] Supreme Court of Peru, Corte Suprema de Justica de la Republica, Sala Penal Especial, Exp. No. AV 19-2001, judgment of 7 April 2009, para. 821 et seq., German translation in: *Zeitschrift für Internationale Strafrechtsdogmatik,* pp. 622- 657 (November 2009); see also English version, Aimee Sullivian, "Translation: The Judgment against Fujimori for Human Rights Violations", *Am. U. International Law Review*, Vol. 25, pp. 657-842 (2010).

[193] N-tv.de, „25 Jahre für Perus Ex-Präsident Fujimori muss hinter Gitter", article of 3 January 2010 [Online] http://www.n-tv.de/politik/Fujimori-muss-hinter-Gitter-article662192.html (accessed on 12 October 2010).

[194] "La autoría mediata por dominio de la voluntad en aparatos de poder organizados". Supreme Court of Peru, *Fujimori*, judgment of 7 April 2009, paras. 718-748.

jointly…."[195] It was guided by the German approach of the control over an organized apparatus of power, to hold Fujimori responsible as a principal for human rights abuses. The Supreme Court made reference to the German border guard judgments[196] and to *Roxin*[197] who evaluated the concept of the perpetration through a hierarchical structure. It stated that Fujimori held the highest position of the state and created an apparatus of power which made it possible for him to pursue his strategy of physically eliminating the opponents.[198] Although the crimes committed by Fujimori were legalized under the old regime, the Court convicted him on the basis of international recognized human rights. It referred to the international case law and to the definition of crimes against humanity of the ICC Statute.[199]

This judgment is of high political and judicial importance. It shows that it is obviously not only a specific German aim to punish political decision-makers as merely participants, but rather as principals.[200] The Fujimori judgment exposes in great detail and in an academic manner the concept of the indirect perpetration. The concept of "indirect perpetration by

[195] *Ibid.* para. 721; Sullivian (2010), 676.
[196] *Ibid.* para. 725.
[197] *Ibid.* para. 726.
[198] *Ibid.* para. 664.
[199] *Ibid.* para. 714, Kai Ambos, „Politische und rechtliche Hintergründe des Urteils gegen den ehem. peruanischen Präsidenten Alberto Fujimori", pp. 552-564, *Zeitschrift für Internationale Strafrechtdogmatik* (November 2009), 552; Sullivian (2010), 675.
[200] Thomas Rotsch ,"Von Eichmann bis Fujimori – Zur Rezeption der Organisationsherrschaft nach dem Urteil des Obersten Strafgerichtshofs Perus", *Zeitschrift für Internationale Strafrechtdogmatik*, pp. 549-551 (November 2009) 549; Claus Roxin, „Bemerkungen zum Fujimori-Urteil des Obersten Gerichtshofs in Peru", pp. 565-567, *Zeitschrift für Internationale Strafrechtdogmatik* (November 2009), 565; Ambos (2009), 564.

hierarchical structures" turned into international practical applications to allocate and establish individual criminal responsibility.[201]

Thomas Rotsch argues that the instrument "perpetration through another perpetrator" is a powerful tool for combating modern criminality phenomenon. He states that the development of the specific legal definition of the "hierarchical structure" has reached its height in this judgment.[202]

IV. International criminal law and leadership crimes

1. Marco-criminality in international law

Since its application by the German courts, the concept of "perpetration through another person" has been developed from the national to the international level in order to charge perpetrators with international recognized crimes.

National criminal law focuses on individual responsibility and guilt for domestic "standard" crimes. It does not have the special provisions to deal with grave crimes which "affect the community as a whole"[203]. Thus, it is not adequate in order to prosecute cruel leaders who used systematic or large-scale force to commit human right abuses.

Conversely, international criminal law especially refers to collective, respectively leadership crimes.[204] The international crimes genocide,

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[201] *Ibid.*
[202] Rotsch (2009), 549; see Supreme Court of Peru, *Fujimori,* judgment of 7 April 2009, paras. 726-744.
[203] ICC Statute, Preamble, Art. 1, Art. 5 (1).
[204] Cassese (2008), 189.

crimes against humanity and war crimes are executed by soldiers and lower ranking officials, but commanded by superiors. Persons occupying top positions in the civil government or the military usually do not physically commit international crimes.[205] Destroying a national, ethnic, racial or religious group normally depends on a concerted action often perpetrated, controlled or tolerated by a state or organization.[206] Thus, international crimes emanate from system criminality and presuppose a multitude of perpetrators.[207] The men at the top require accurate planning and hierarchical organization to make sure that their plans and orders will be executed.[208] The various forms of perpetration make it possible to hold the perpetrator criminal liable for his individual contributions in the collective crime. Commission as an individual and joint commission address primary liability as the result of one´s own conduct. Aiding and abetting, planning, instigation and ordering, address secondary, thus, accessory liability for a crime committed by someone else.[209] A head of a state or a brutal organization can certainly be held responsible for instigating or ordering crimes which were executed by subordinates. However, would it not be more just to punish him as a principal even if he was not at the scene of the crime and did not physically carry out the crimes? Is he not a perpetrator at the first level rather than at the second level of liability? The degree of criminal responsibility does not decrease

[205] Harmen van der Wilt, "The Arrest Warrant against the President of Sudan: Reasoning and Implications of the ICC Decision, The continuous quest for proper modes of criminal responsibility", *Journal of International Justice*, Vol. 7, pp. 307-314 (May 2009), 307, 308; Osiel, (2005), 1753.
[206] Hans Vest, "A Structure- based concept of genocidal intent", *Journal of International Criminal Justice,* Vol. 5, Oxford University Press, pp. 781-792 (September 2007), 784.
[207] van der Wilt (2009), 308.
[208] *Ibid.*
[209] For Individual Criminal Responsibility see: Werle (2009), paras. 440 et seq.

as distance from the actual crime increases. Instead it grows the more far the superior is away from the subordinate.[210] The dangers of collective crimes lie in the power which comes from the top down to the subordinate level. A hierarchical system which seeks to oppress or exterminate a specific group of people, gains more power the more control it has over its own members. Mass atrocities can only occur through the organized cooperation of many perpetrators who execute the crimes.[211] The collective operates together because the leaders at the top want to fulfil their plans through them. Thus, leaders bear the highest level of responsibility.

As a consequence, international criminal law had to design a concept that provides criminal responsibility for political and military leaders who act behind the scenes and do not personally commit atrocities. The aim was to raise the criminal accountability of leaders at the highest degree of individual criminal responsibility.[212]

It should be kept in mind that the individual perpetrator is responsible as a principal as well. He can also not shield behind the instructions of the superior because he is able to make his own decision if he wants to carry out the crime or not.

[210] *Ibid.* para. 441.
[211] Osiel (2005), 1753.
[212] van der Wilt (2009), 308.

2. Jurisprudence of the *ad hoc* Tribunals:

The doctrine of participation in a Joint Criminal Enterprise

In the mid-nineties the United Nations Security Council established two *ad hoc* Tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) in order to prosecute serious crimes committed during the wars in the former Yugoslavia, and the International Criminal Tribunal of Rwanda (ICTR) in order prosecute the Rwandan Genocide.[213] Fifty years after the International Military Tribunal in Nuremberg that was the first time that the courts had to apply international criminal law to convict the perpetrators of the predecessor regimes.

The ICTY and the ICTR also faced the challenge of holding leaders who are removed from the scene of the crime liable as principals. They charged perpetrators whose conduct was covered by the concept of commission through another with planning, ordering, instigating or participation in a criminal enterprise.[214] The Joint Criminal Enterprise (JCE) doctrine extends the responsibility of participants in mob violence and to those who can be qualified as the intellectual acting persons of system criminality. The convictions based on the JCE doctrine demonstrate the dynamics of collective action of international crimes. [215]

[213] Introduction of the ICTY and ICTR Statute; Blantekas/Nash (2007), Chapter 20, 513 et seq.

[214] Werle, (2009), paras. 456, 474; See ICTY Appeals Chamber, *Prosecutor v. Tadic*, IT-94-1-A, judgment of 15 July 1999, paras. 194 et seq.; ICTY Trial Chamber*, Prosecutor v. Vasiljevic,* IT-98-32-T, judgment of 29 November 2002, para. 67: "(A)ll of the participants in a joint criminal enterprise are equally guilty of the committed crime regardless of the part played by each in its commission."

[215] van der Wilt, "Guilty by Association: Joint Criminal Enterprise on Trial Possibilities and Limitations", *Journal of International Criminal Justice*, Vol. 5, pp. 91-108 (March 2007), 91.

Its extended form makes it possible to hold participants accountable for consequences which went beyond the framework of the common plan if they were a "natural and foreseeable consequence".[216]

Convictions can be maximized due to the fact that perpetrators can be held liable as principals for participation without sharing specific intent regarding the crime attributed.[217] However, the dangerously illiberal doctrine [218] stretches the limits of joint perpetration too far. The conviction of persons who do not fulfil the respective *mens rea* of the crime violates the principle of individual guilt.[219]

Although the Tribunals apply a fairly wide approach to address individual criminal responsibility, they do not acknowledge the notion of "perpetrator behind the perpetrator". In the *Stakic* trail the ICTY recognized that "committing" means that the perpetrator participated directly or indirectly as a "perpetrator behind the perpetrator" in the material elements of the crime.[220] However, the Appeals Chamber refused this approach since the concept of "indirect co-perpetration…does not have support in customary international law or in the settled jurisprudence of this Tribunal".[221]

[216] See inter alia: ICTY Appeals Chamber, *Prosecutor v. Tadic*, IT-94-1-A, judgment of 15 July 1999, para. 228.
[217] Any contribution to the realization of the common plan suffices. Werle (2009), paras. 462, 463; Cassese (2008), 191.
[218] Mark Osiel, "The Banality of Good: Aligning incentives against mass atrocity", *Columbia Law Review*, Vol. 105, No. 6, pp. 1751-1862 (October 2005), 1751, [Online] http://www.jstor.org/stable/4099503 (accessed on 6 May 2010).
[219] Kai Ambos, *Internationales Strafrecht,* Munich: C.H. Beck Verlag (2008), § 7, 32 et seq.
[220] ICTY Trial Chamber, *Prosecutor v. Stakić,* IT-97-24, judgment of 31 July 2003, para. 439 *et seq.*
[221] ICTY Appeals Chamber, *Prosecutor v. Stakić* (IT-97-24), judgment of 22 March 2006, para. 62.

In contrast, the German scholar *Kai Ambos* argues that the JCE doctrine has no concrete legal basis in the ICTY but that the "perpetrator behind the perpetrator" concept indeed can be based on Art. 7 (1) ICTY Statute.[222] The term "commission" in this sense would mean that a person "participated, physically or otherwise directly or indirectly, in the material elements of the crime through positive acts or, based on a duty to act, omissions, whether individually or jointly with others". Therefore he states that indirect perpetration does include "perpetration-by-means".[223]

3. The "perpetration-by-means" concept of the International Criminal Court

The jurisprudence of the ICTY cannot be transferred to the Rome Statute of the International Criminal Court (ICC Statute) because it is an independent body of law with its own structure.[224] The ICC developed an approach, which takes into account that commission demands the highest degree of individual criminal responsibility and that therefore the material and the mental element of joint commission must be constructed strictly.[225]

a) Individual criminal responsibility: Art. 25 (3) ICC Statute

Art. 25 ICC Statute divides the various modes of participation in four categories.

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[222] Kai Ambos, "Joint Criminal Enterprise and Command Responsibility", *Journal of International Criminal Justice,* Vol. 5, pp. 159-183 (2007) 182.
[223] *Ibid.,* Art. 7 ICTY Statute.
[224] See ICC Pre-Trial Chamber, *Prosecutor v. Katanga and Ngudjolo Chui*, case no.: ICC-01/04-01/06, decision of 29 January 2008, para. 508 (with reference to Werle, (2007), 961)
[225] Werle (2009), para. 466; Werle (2007), 947.

Committing a crime as a principal is the first category and the highest degree of participation.[226] According to Art. 25 (3) (a) ICC Statute a principal perpetrator can commit the crime "whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible".[227]

Art. 25 (3) (b) ICC Statute determines ordering, soliciting or inducing of a crime as the second category. Art. 25 (3) (c) ICC Statute refers to aiding and abetting as the third category and Art. 25 (3) (d) ICC Statue provides the fourth and weakest form of participation: contributing in any other way to a commission of a crime by a group.[228]

b) Art. 25 (3) (a) third alternative ICC Statute:

The "perpetration-by-means" approach

Art. 25 (3) (a) third alternative ICC Statute (perpetration "through another person") transferred the "perpetrator behind the perpetrator" concept to the international level. This mode of participation, where the perpetrator exercises control over the will of those who physically perform the material elements of the crime, refers to a typically superior position.[229] It makes it possible to punish crimes where a person, who actually committed the

[226] *Ibid.*
[227] Art. 25 (3) (a) ICC Statute.
[228] See Werle (2009), paras. 465-493.
[229] van Sliedregt, (2003), 71.; ICC Pre-Trial Chamber, *Prosecuter v. Lubanga Dyilo*, decision of 29 January 2007, para. 332; ICC Pre-Trial Chamber, *Prosecutor v. Katanga and Ngudjolo Chui*, case no.: ICC-01/04-01/07, decision of 30 September 2008, para. 497; Kai Ambos, in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* New York: Oxford University Press (2002), p. 767 at paras. 793.

crime, was used as an instrument of the superior in the background.[230] Like in the German concept, the notion implies control exercised by means of an organized hierarchical structure.[231] The concept of the ICC is wider than the classical concepts in national law because it includes both, innocent and culpable agents, which allows the application of the concept to a broad range of situations. That the "perpetrator-by-means" is liable if the direct perpetrator is not liable acknowledges the German concept of the "perpetrator behind the perpetrator." The addition expressly does not exclude the possibility that the direct perpetrator can be manipulated, even if he is also fully responsible for the crime.[232]

The including of this new mode of participation on the international level is remarkable in two ways. Firstly, "perpetration-by-means" was neither regulated by international law before nor was it acknowledged in customary law. Secondly, it determines that this conduct involves the highest degree of criminal responsibility.[233]

The importance of the doctrine can be seen on the cases with which the ICC is dealing so far. The notions of co-perpetration and perpetration-by-means are at the core of the case law.

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[230] van Sliedregt (2003), 68, 71; Ambos, "Article 25: Individual Criminal Responsibility", in: Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd ed., Baden-Baden: Nomos (2008), 10-13.
[231] Werle (2009), para. 476.
[232] Jessberger/Geneuss (2008), 296.
[233] Werle (2009), para. 474. Some authors find it is questionable whether it was necessary to include this form of liability because in international law the accomplices may not be given a lower sentence than is available for principal perpetrators. Furthermore it would downgrade the gravity of the acts committed, by those closest to the crime. See Robert Cryer, Hakan Friman, Darryl Robeinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure,* Cambridge: Cambridge University Press (2008), 303.

4. The application of the concept in current cases of the ICC

a) Katanga and Chui Case

The trail against the Congolese warlords *Germain Katanga and Mathieu Chui* is the second and the most important current case of the ICC. It stands as an example of how the "perpetrator by means" doctrine is being applied in practice. The Pre-Trial Chamber stated that even an indirect co-perpetration is possible.[234]

The Democratic Republic of the Congo (hereinafter DRC) referred the situation by itself to the ICC in March 2004. In June 2004 the Office of the Prosecutor (hereinafter OTP) opened its investigation into crimes committed in the DRC since July 2002.[235] *Katanga and Chui* are accused of war crimes (Art. 8 (2) (b) ICC Statute) and crimes against humanity (Art. 7 (1) ICC Statute).[236] The OTP indict them for murder or wilful killing, inhumane acts, sexual slavery, rape, cruel or inhuman treatment, using children to participate actively in hostilities, outrages upon personal dignity, intentional attack against the civilian population, pillaging and destruction of property.[237] *Kantaga and Chui* allegedly used their groups

[234] Pre-Trial Chamber I, Decision on the Confirmation of Charges*, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07, decision of 30 September 2008, paras. 520 et seq.

[235] See homepage ICC, *Case: The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*: http://www.icc cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation +ICC+0104/Related+Cases/ICC+0104+0107/Democratic+Republic+of+the+Congo.htm (accessed on 9 October 2010).

[236] *Prosecutor v. Katanga and Chui*, (ICC-01/04-01/07-384-Anx1A), Prosecution´s Submission of Amended Document Containing the Charges and Additional List of Evidence of 12 June 2008, ICC-01/04-01/07-649-Anx1A, Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648 of 26 June 2008.

[237] See marginal no. 235.

(the FRPI and the FNI[238]) to exterminate the village Bogoro in the Ituri district of the eastern DRC and murdered thousands of people from January to March 2003.[239]

They are charged pursuant with article 25 (3) (a) ICC Statute with criminal responsibility as co-perpetrators.[240] The Pre-Trial Chamber frequently referred to German jurisprudence and German scholarly writings which describe the preconditions for establishing "perpetration-by-means" through control over a hierarchical organization.[241]

aa. Control over the crime approach

The Pre-Trial Chamber first referred to the *Lubanga* Decision[242] which emphasized that the commission of a crime "through another person" is the most typical manifestation of the concept of "control over the crime". As in German law, in international criminal law, the leading principle for distinguishing between principals and accessories to a crime is the control over the crime approach.[243] Even if principals are removed from the scene

[238] Force de Résistance Patriotique en Ituri (hereinafter FRPI) led by Katanga, Front des Nationalistes et Intégrationnistes (hereinafter FNI) led by Chui.
[239] ICC Pre-Trail Chamber I, *Prosecutor v. Katanga and Chui*, decision of 30 September 2008, para. 466.
[240] See marginal no. 235.
[241] ICC Pre-Trail Chamber I, *Prosecutor v. Katanga and Chui*, decision of 30 September 2008, paras. 482- 485, 493, 496, 498, 510, 514 et seq.
[242] ICC Pre-Trial Chamber I, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga Dyilo,* ICC-01/04-01/06, 29, decision of 29 January 2007.
[243] ICC Pre-Trail Chamber I, *Prosecutor v. Katanga and Chui*, decision of 30 September 2008, paras. 484, 485; „Tatherrschaftslehre", Täterschaft und Tatherrschaft: Claus Roxin, *Strafrecht, Allgemeiner Teil II,* 8th Edition, Berlin: de Gruyter (2006), Chapter 2, paras. 25, 30.

of the crime, they control or mastermind its commission because they decide whether and how the offence will be committed.[244]

bb. Organized and hierarchical apparatus of power

Katanga and Chui operated within a hierarchical structure of an organized apparatus of power. The two accused were in the top echelon and the soldiers who acted as direct perpetrators at a subordinate level.[245] Like the German courts the Pre-Trial Chamber recognized increasing culpability with a rise in the hierarchy. “The higher rank or farther detached the mastermind is from the perpetrator, the greater that person´s responsibility will be”.[246]

cc. Execution of the crime secured by almost automatic compliance with the orders

The Chamber stated that the organization must be “composed of sufficient subordinates to guarantee that superiors´ orders will be carried out, if not by one subordinate, then by another.”[247] The “replaceability of subordinates” enables “automatic compliance with the senior authority´s orders.” The control of the apparatus can be achieved “through intensive, strict and violent training regimes”.[248]

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[244] ICC Pre-Trial Chamber I*, Prosecutor v. Lubanga*, decision of 29 January 2007, paras. 138, 330.
[245] ICC Pre-Trail Chamber I, *Prosecutor v. Katanga and Chui*, decision of 30 September 2008, paras. 511 et seq.
[246] *Ibid.* para. 503.
[247] *Ibid.*
[248] *Ibid.* para. 518.

dd. Co-perpetration based on joint-control

Katanga and Chui are not only accused for using their respective own troops, but also for acting through the respective other troop, although they did not have influence on it by themselves.

(1) Co-perpetration in general

In general the material and the mental elements for joint commission of a crime require: (1) multiple participations (2) a common plan that envisages the execution of a crime against international law and (3) an essential contribution to that plan. (4) Each joint perpetrator must personally fulfil all subjective elements of the envisaged crime himself (principle of culpability).[249] The perpetrator must have the awareness of the risk that the crime might be committed in the execution of the common plan and he must accept of the risks.[250] The Pre-Trial Chamber stated that *Katanga and Chui* were co-perpetrators because they had a common plan and because both did an essential contribution to commit the alleged crimes.[251]

(2) Extended form: Cross-responsibility

Although the troops of Katanga (FRPI) and Chui (FNI) "accepted orders only from leaders of their own ethnicity"[252], the accused may be held responsible for the acts committed by the respective other troop.

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[249] Werle (2009), para. 472.
[250] ICC Pre-Trail Chamber I, *Prosecutor v. Katanga and Chui*, decision of 30 September 2008, para. 409.
[251] *Ibid.* 419 et seq.
[252] *Ibid.* para. 493.

They had the common plan to use their independent groups to eradicate the village. Their respective essential contribution was their acting through their particular subordinate group.[253]

Between co-perpetrators, the crimes comprised by the plan, are subject of mutual attribution. Indirect co-perpetration goes beyond that, since even those crimes are being attributed which the co-perpetration could not "control". The crimes committed by subordinates who were not controlled by the co-perpetrator "may be ascribed to each of them on the basis of mutual attribution". The co-perpetrator is then "criminally liable for the crimes committed by the fully responsible subordinates of his co-perpetrator".[254] This concept of reciprocal attribution extends indirect perpetration to situations where the superior does not have the full control over all direct perpetrators but where his contribution is essential for the commission of the crime. The Chamber stated that the "essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes".[255] The "coordinated essential contribution by each co-perpetrator" resulted in the "realization of the objective elements of the crime".[256]

According to the Pre-Trial Chamber, both acted with specific intend and were aware of the circumstances that they would use both troops subordinated by one of each other.[257]

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[253] Ibid. para. 519-521.
[254] *Ibid*. para. 519.
[255] *Ibid.* para. 525.
[256] *Ibid.* para. 523.
[257] *Ibid.* para. 520 et seq.

Cross-responsibility as an extended form of indirect perpetration is a consequence of joint commission, because both leaders agreed to commit the crimes. Co-operation between leaders of different hierarchical organizations can generate even more power to achieve the cruel common plan. Especially, when it comes to prosecution of macro-criminality where several leaders of different groups act together, this concept can be an effective tool to allocate acts committed by soldiers to their leaders.

The German courts also held the GDR leaders responsible as indirect co-perpetrators although some of their contributions in the committee decisions were less determining for the shooting orders than others.[258] For attributing the contributions of the others, it was important that they decided together.[259] They all had influence on the subordinates, just the quality of the contributions and the political rank varied.

Katanga and Chui's influence on the subordinates was different. Whereas the GDR officials exercised the control jointly across the hierarchies, *Katanga and Chui* could only exercise control over their respective organized group. There were two hierarchies, commanded by two independent leaders. The lack of control over the other group is compensated due to the fact that *Katanga and Chui* had a common plan to use both groups. Thus, in this case co-perpetration catches and accumulates acts which are far moved from the indirect perpetrator.

[258] Federal Court of Berlin, *Krenz*, judgment of 25 August 1997, para. 275.
[259] All defendants had a full right to vote in the decisions which established the border policy. Federal Court of Justice, *Krenz*, judgment of 8 November 1999, para. 49.

b) Al Bashir warrant of arrest

The *Omar Hassan Ahmad Al Bashir* warrant of arrest shows again the influence of German legal thought on recent ICC case law. [260] The ICC charges him with genocide, war crimes, and crimes against humanity for the human rights abuses in Darfur. Allegedly up to 300,000 people have died and 2.7 million were expelled.[261] The prosecutor of the ICC referred to the concept of "perpetration-by-means" to issue a warrant of arrest with accordance to Art. 58 (1) (a) ICC Statute against the President of Sudan who still is in power.[262] The warrant of arrest is exclusively based on the concept of indirect (co)-perpetration. "The prosecution does not allege that *Al Bashir* physically or directly carried out any of the crimes. He committed crimes through members of the state apparatus, the army and the Militia..."[263] The prosecutor stated that *Al Bashir* had the "final say about the adoption and implementation" of the policies. The OCP emphasized the absolute control of *Al Bashir* over the armed forces. He had imposed his dominant will over the direct perpetrator and was aware of his role.[264]

[260] First warrant of arrest issued by the Pre-Trial Chamber I on 4 March 2009 and the second on 12 July 2010; van der Wilt, "The Arrest Warrant against the President of Sudan", *Journal of International Criminal Justice* (2009), 307.
[261] Mike Corder, "Al-Bashir Arrest Warrant Issued By International Criminal Court", 4 March 2009, [Online] http://www.huffingtonpost.com/2009/03/04/albashir-arrest-warrant-i_n_171703.html (accessed on 7 October 2010).
[262] See ICC homepage, *Case: The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Online] http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109 (accessed on 9 October 2010).
[263] ICC Public Redacted Version of Prosecutor's Application under Art. 58 filed on 14 July 2008, *Situation in Darfur, Sudan*, ICC-02/05-157, warrant of arrest 12 September 2008, para. 39.
[264] *Ibid.* paras. 248 et seq.

Al Bashir could also be held responsible under Art. 28 ICC Statute which addresses "responsibility of commanders and other superiors." But this form of participation is subsidiary to Art. 25 (3) and imposes a lesser extent of responsibility, since it merely establishes responsibility for omission.[265]

The warrant of arrest is the first action of the ICC against a sitting head of state. This is an important international recognized sign and could lead to more dictatorial leaders being indicted. Using this concept prosecutors and judges demonstrate how warlords exercise their power and communicate with their subordinates in order to accomplish their heinous goals.[266]

Chapter 5: Prospect, impact and effect of deterrence

I. "Perpetration-by-means": development to a key mode of criminal liability

Although there is no final judgment on the aforementioned cases yet, the "perpetration-by-means" concept found its way into international law and practice. Due to its application, the concept can be strengthened and improved. As long as the ICC cannot refer to its own jurisprudence to interpret the requirements of the concept, the guidelines given by the German doctrine and jurisprudence can be used.[267] The German courts have not dealt with genocide, war crimes or crimes against humanity in this context. However, the evaluated preconditions and their

[265] Jessberger/Genuess (2008), 865.
[266] van der Wilt (2009), 308.
[267] Jessberger/Genuess (2008), 866; Werle (2009), paras. 475-477.

interpretations can provide some guidance for applying and sharpening international law.

The so called border guard cases had a significant impact on international criminal law. The German courts recognized the power which can be generated by a hierarchical organization used by its leaders to commit crimes through their subordinates. The concept of indirect perpetration through a full responsible direct perpetrator provides the right tool for constructing liability of those at the policy level. Through its determination in Art. 25 (3) (a) ICC Statute, it is now used to charge warlords for their cruel human rights abuses.

The "perpetration-by-means" doctrine also takes into consideration that the perpetrators who carried out the crimes physically are criminally liable as well. However, it is impossible to hold all perpetrators accountable for their deeds in human rights abuses, especially when the previous regime existed for a long period, as it has been the case in the socialist system of the GDR.[268] At least responsibility for those who commanded human rights abuses on the highest level should be evaluated. The conviction of the leadership stands vicariously for the liability from their subordinates. A conviction of even these persons can be achieved only through an extended concept of responsibility that attributes the number of wrongful acts performed by others to their superiors.[269] The doctrine addresses not only individual guilt but also expresses the effects of a dictatorial hierarchical system.

[268] Osiel (2005), 1751.
[269] *Ibid.* 1764.

The concept of "perpetration-by-means" could play a central role and possibly become a "key mode of liability in international criminal law".[270]

National prosecutors in transitional democracies may apply the concept to address "superior responsibility" for high-ranking past leadership. It allocates responsibility between those who have different roles and conduct at different stages of a crime. It includes the "small fry" who execute the crimes and the "big fish" regardless to the culpability of the subordinates. However, one should not leave out of consideration that the application of this concept also comprises the risk of liability that goes far beyond direct perpetration. For that reason the requirements for the objective and subjective elements of the crime must be preserved strictly.

The extended form of the doctrine, evaluated in the *Katanga and Chui* case, gives a prospect in which direction the concept will be developed in further cases.

II. The German approach: Role model and guideline

1. Exemplary outcomes

Transitional criminal justice after the German Unification evaluated important outcomes which can be seen as exemplary.

Germany demonstrated that a new democracy needs the courage and the power to resolve the past by criminal prosecution. The judiciary has to be consequent in the manner it charges and convicts the leadership of the previous repressive system. Holding against all criticism and opponents,

[270] Jessberger/Geneuss (2008), 867; Claus Kress, „Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht", 153 *Goltdammer's Archiv für Strafrecht,* pp. 304-310 (2006), 308.

Germany was serious about coming to terms with its past and found fair results.

The German criminal justice process developed new approaches and attempts for convicting superiors: The way the courts dealt with the statutory laws and the mode of participation which they used to assign criminal responsibility to the leadership officials, exemplifies the application of modern criminal law.[271]

Furthermore, the criminal prosecutions after German Unification yield contemporary history. They generated important historical information since they explained the chain of instructions and the orders that led to the violence at the border.[272] The convictions state clearly who participated in the repressive system and who helped the former regime to exist. The trials stand for the evaluation of individual guilt of superiors and accountability for state injustice. Since the legal response to systematic injustice is a core problem of criminal law, the prosecutions in Germany provided clarification, acknowledgement and legal disapprobation of the injustices of the past.[273] The German approach to deal with its past demonstrates that in general the confrontation with the past by criminal prosecution is necessary. New democracies should punish the wrongs of the past. At least they should hold accountable those who have committed

[271] Klaus Marxen, "Comment on Christoph Schaefgen´s Paper", in Gerhard Werle (ed.), *Justice in Transition Prosecution and Amnesty in Germany and South Africa*, Band 29, Berlin: Berliner Wissenschaftsverlag, pp. 27-32 (2006), 29.
[272] *Ibid*. 27, 29.
[273] *Ibid*, 30; Gerhard Werle, Introduction, in: Werle (ed.), *Justice in Transition*, pp. 1-9 (2006), 2.

the most serious crimes. For the credibility of a new system it is absolutely vital to distance itself from its predecessors.[274]

2. Impact on other transitions

Germany chose the "prosecution model" to deal with the former leadership. By doing so it gained important experience in punishing human rights abuses of the past which are of use to other countries in the future.[275]

Many other societies will emerge from a dictatorship, a totalitarian or oppressive system, or a civil war, to a democratic state. They all will have to face the task of building a stable new system by acknowledging the past and reconcile the society. The key challenge of criminal justice is to find a just way to prosecute the perpetrators who were involved in mass atrocities.[276]

Only a few new democracies have chosen the option of criminal prosecution so far. After the change of the system, the leadership and the old rulers were mostly treated gently. Resolving the past by criminal prosecution was the exception.[277] Other ongoing or forthcoming transitions such as in Iraq, Afghanistan, or in African states like Kenya, have to challenge the same questions as Germany did after unification. The

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[274] Annette Weinke, "Comment on Christoph Schaefgen´s Paper", in Werle (ed.), *Justice in Transition*, pp. 33-38 (2006), 33.
[275] Werle (2006), 1.
[276] Osiel (2005), 1751; Kritz, "The Dilemmas of Transnational Justice" (1995), xxi.
[277] Examples for other transitions see Albin Eser/Jörg Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht*, Band 82.1, Freiburg: iuscrim edition (2000); Neil J. *Kritz*, "How Emerging Democracies Reckon with Former Regimes", in: Neil J. Kritz (ed.), *Transitional Justice, Vol. III: Country Studies,* Herndon, Virginia*: United States* Institute for Peace Press (1995).

question of how to deal with the human rights abuses of the previous repressive regime, and how to convict the leadership officials whose decisions led to the cruel execution.

The German way of resolving the past took place under special conditions and was unique due to the fact that a peaceful revolution in Eastern Germany led to the complete collapse of the previous regime.[278] The significance of the German transition was that the GDR acceded to the FGR. There was no new state created which is usually the case when a system ceases to exist.

Criminal justice depends on various factors. The previous system, its duration and how this regime was defeated have an impact on the process of criminal justice. It is also influenced by political decisions, financial resources and of course the will of the society, to resolve the past by criminal prosecution. The judicial system must be stable enough to undertake criminal investigations against high-ranked former officials. It is also important that the new regime stand behind the way it has chosen to convict the perpetrators. Besides difficulties in finding a stringent argumentation regarding the prohibition of ex-post facto punishment, the German courts were consequent in their findings and convictions.

It makes a difference whether a state undertakes criminal prosecutions upon itself or whether they are imposed by another state. The unified Germany was able to undertake prosecution by itself without help or the influence of other countries. It also needs to be mentioned that the criminal

[278] Werle (2006), 1.

justice process in Germany was accompanied by other important mechanisms.

In states in which the change of the system was forced, trials against the previous leadership are likely to be imposed and influenced by the victory power as well. The convictions might as a consequence be preserved as "victor's justice"[279] and would not correspond to the will of the society.

Due to the different conditions in new democracies, the German approach cannot completely be transferred to others. However, Germany created a new standard for a transition process. If other states have to face the challenge of criminal justice they can learn from the German experience, its mistakes and can profit from its results. The approach can serve as a guideline on how to convict superiors of a previous repressive regime. At least the German criminal justice approach gives an incentive to young states to create long-time peace and justice. The prosecutions stand as a symbol for resolving the past injustices and to raise the awareness for the past which prevent a recurrence.

III. Effect of deterrence

The German approach could have a deterrent effect on potential violators of human rights and on states who hesitate to prosecute human rights abuses.

[279] This was an accusation against the Nuremberg Trials in 1945, where the allies convicted the Nazi leadership. See Tomuschat, "The Legacy of Nuremberg", *Journal of International Criminal Justice*, pp. Vol. 4, 830-844 (2006), 832.

1. Potential human rights violators

Subsequent prosecution of mass atrocities could prevent the committing of them in the future. At least the conviction of a leader as a “perpetrator-by-means” raises the awareness for the responsibility for collective crimes ordered and planed by superiors.

The developed concepts could have a deterrent effect on states that are, or become potential violators of human rights. States or organized groups and their leadership cannot rely on unjust statutory law. They must be aware that their human right abusive rules and practice have no legal force when it comes to criminal prosecution. Even if the repressive laws were valid in the previous system, they cannot shield the perpetrators against prosecution. The awareness that laws in contravention of fundamental human right standards have no international acceptance could prevent the application or even the enactment of them. The leaderships must fear that they will hold accountable and therefore refrain to enact repressive laws from the beginning on.

2. States which hesitate to prosecute

The judgments can be seen as a warning for other states. New democracies get under international pressure to prosecute the former leadership of the previous system. The German approach demonstrates that it is possible to handle the accompanied problems of criminal prosecutions after a transition. Under customary and international criminal law states are obliged to prosecute human rights abuses which occurred

in their territory.[280] If states refrain from prosecutions of human rights abuses, they lose international reputation and cannot be acknowledged as sovereign states under the rule of law. By not holding previous high-ranking leaders accountable for their deeds the new democracy would have a reputation of protecting human rights violators. By failuring to do so they infringe human rights as well.

IV. Conclusion

Twenty years after unification, Germany is a stable democracy. The transition process was successfully concluded through the combination of different mechanisms to resolve the past. Criminal justice in Germany was installed with unprecedented efficacy. It took about ten years, covered the entire country and challenged the legal system. The scrutinized legal issues are the practical difficulties a new democracy has to deal with when a legal system ceases to exist. The judiciary was torn between observing legal constraints and insisting on material justice, between paying tribute to the victims and degrading the perpetrators, between satisfying international and inner-political expectations.[281] The prosecutions had an influence on the German society and Germany's image in the world. They strengthened the stability of the new system and the confidence in the new government. Regarded from an international point of view the criminal justice process in Germany created and raised the awareness for the responsibility of past atrocities and underlined the duty to punish abuses of human rights. The German transitional criminal justice can be seen as a

[280] Werle (2009), paras. 194 et seq.
[281] Roth (2004), 39.

pioneering role for similar situations where human rights abuses of predecessor system need to be prosecuted.

The research proved the development of the concept “perpetration-by-means” from the origin in Germany to its recognition in international law. The national judgments and discussions had an influence on the international law but conversely the international law has an increasing influence on the national law. The research also demonstrated that successor governments face difficult realities when they decide to punish the injustices of the past. It must be out of consideration that in times of transition, courts should restrict the prohibition on retroactive punishment to convict perpetrators who relied on previous repressive laws. Convictions can be perceived as retribution but they symbolize justice and the seriousness of the new regime of coming to terms with the past. They lead the system in a future based on honesty and reappraisal.

(19.932 words including footnotes)

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