

TO PROSECUTE OR NOT TO PROSECUTE: PROBLEMS ENCOUNTERED IN THE PROSECUTION OF FORMER COMMUNIST OFFICIALS IN GERMANY, CZECHOSLOVAKIA, AND THE CZECH REPUBLIC

INTRODUCTION

More than seven years have passed since the Berlin Wall fell in Germany and the "Velvet Revolution"¹ took place in Czechoslovakia. Since then, the governments of Czechoslovakia, the Czech Republic,² and a reunited Germany have struggled with their communist pasts. One of these democracies' most difficult decisions is whether to prosecute former communist officials for alleged abuses perpetrated under their regimes. It would be simpler for these governments not to prosecute and dredge up a sometimes painful past; these governments, however, have chosen to pursue their former communist leaders. Once the decision to prosecute was made, the issue to prosecute under international or domestic law remained. Germany, Czechoslovakia, and the Czech Republic have prosecuted under domestic law, but at least one German appellate decision has relied on international law to affirm the decision of the lower court. When they applied domestic law, the judges reached similar verdicts in similar cases; however, depending on the judge, a rationale based on natural law or positive law determined the outcome.

These choice-of-law decisions and certain non-legal barriers to prosecution, such as politics, have not and should not act as a deterrent to prosecution. Abuses of power were committed by government officials, and those officials should be held accountable. The governments abandoned certain prosecutions because the accused were either too old or too sick to stand trial. If the prosecutions had continued, the governments would have been accused of being as insensitive and inhumane as their predecessors. Yet, some officials escaped prosecution even though they were neither too sick nor too old to stand trial.

This article will address these issues in the context of the trials of the East German border guards and that of six former high-ranking East German communist officials. In Czechoslovakia and the Czech Republic, these issues will be examined in the context of Miroslav Stepan's trial and the

1. "Velvet Revolution" is the term used to describe the smooth transfer of power from the Communists in Czechoslovakia to their successors.

2. Czechoslovakia remained a country until July 1992 when Slovakia peacefully seceded from the Czech Republic. Upon becoming its own country, the Czech Republic incorporated the laws of post-communist Czechoslovakia into its own laws. This article will deal strictly with the Czech Republic's attempts to prosecute former communist officials after the breakup of Czechoslovakia because Slovakia has not pursued prosecuting officials living within its boundaries as vigorously as the Czech Republic.

attempt to bring charges against other former communist officials. Bringing formal charges and appearing before a court of law is not the only way to prosecute in the Czech Republic. The Czech government has instituted an informal process of finding guilt known as lustration which will also be examined.

I. BRIEF HISTORY OF COMMUNIST RULE

A. East Germany

The Communists ruled the German Democratic Republic ("GDR") with an iron fist from the end of World War II until the Berlin Wall fell in 1989. The Social Unity Party in East Germany used "the mechanisms of state control" to create a single body of followers, ignoring its citizens' most basic human rights in the process.³ The repression started after the Soviets took power in 1945; almost 100,000 people died with the assistance of former East German communist rulers and the Soviet occupiers who ruled before them.⁴ Between 1950 and 1981, "hundreds of people died after torture in East German prisons and 170 were executed by guillotine or firing squad."⁵ Approximately one-third of those who died were found guilty of participation in "political activity or 'treason'" as a result of defection from the *Staatssicherheitsdienst (Stasi)*, the East German secret police; two-thirds were found guilty of war crimes or murder.⁶

In 1952, ten years before the Berlin Wall was completed, the East German repressors secured the confines of the two Germanys outside of Berlin as the East German government announced that it was "building socialism in earnest."⁷ However, not all of the citizens who had been confined to the "workers' and farmers' republic" were ready to become a

3. Colloquy, *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, in 12 B.C. THIRD WORLD L.J. 241, 247 (1992) (remarks by Horst Gemmer).

4. Adrian Bridge, *Germany: Iron Curtain's 100,000 Dead - Communist Rulers Killed Up to 100,000*, INDEPENDENT ON SUNDAY, Oct. 27, 1991, at 11, available in LEXIS, World Library, TXTWE File. Approximately 65,000 died between 1945 and 1950 in or on the way to Soviet internment camps for political prisoners. Soviet army courts condemned another 756 men, women, and children to death in the first years after World War II for rebellious acts such as dispensing literature of opponents to the communist regime. *Id.*

5. *Id.*

6. *Id.* In their attempt to conceal the character of the government, the leaders of East Germany forged accounts of victims' deaths. For example, the death records characterized a woman executed for espionage in 1955 as having perished from a "collapse of the heart and circulatory system." *Id.*

7. Thomas H. Irwin, *And the Wall Came Down*, 76-APR A.B.A. J. 76, 76 (Apr. 1990).

part of "this construction project."⁸ On June 17, 1953, workers went on strike in more than 270 cities in the GDR to protest the lack of "free elections."⁹ During the protest twenty-seven participants were slain, and approximately 1000 East Germans went to jail for taking part in the strike.¹⁰ The consequence of the protests was the infliction of martial law by the People's Police and the Soviet military.¹¹ Like the leaders of Czechoslovakia after the Prague Spring of 1968, Walter Ulbricht, the GDR's Communist Party leader, was "left to build his socialist Utopia by fiat with the backing of Warsaw Pact troops."¹²

Two of the best-known legacies of the Communists' occupation of East Germany are the infiltration of the *Stasi* into the general populace and the construction of the Berlin Wall with its armed guards standing watch over the frontier. With its army of full-time employees and numerous informers, the *Stasi* gathered data on more than thirty-three percent of the GDR's population.¹³ The *Stasi* recorded every taped telephone conversation, every seized letter, and every fragment of conversation caught by its omnipresent bugging devices.¹⁴ After the fall of the Berlin Wall in 1989, the confidences within the *Stasi* files soon started to seep out, "revealing that husbands had been spying on their wives, children on their parents and priests on their parishioners."¹⁵ This secret has been revealed through a reconstruction of files by the German government.

The most recognized symbol of the communist government in the GDR was the Berlin Wall which was built in 1961. There were allegations of more than 4000 cases of ruthless punishment against those who tried to

8. *Id.* Paradoxically, opposition came from the laborers, whose concerns the Communists allegedly represented "under Marxist-Leninism as the 'vanguard of the proletariat.'" *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Germany: Stasi Truths*, GUARDIAN, Aug. 20, 1993, at 20, available in LEXIS, World Library, TXTWE File. Before the Berlin Wall fell, numerous files were destroyed or sent to Moscow, but when 100,000 East Germans searched the main offices of the *Stasi* on January 15, 1990, they found more than 100 miles of documents still shelved. *Id.*

14. *Id.*

15. *Id.* A typical story is that of Heidi Brauer. She was a 19-year-old factory worker and member of the Protestant Church in 1953 when some pamphlets were discovered in the plant where she worked promoting a "neutral, nuclear-free Germany," ideas considered "seditious in the GDR." Brauer was a suspect because she belonged to the church, and the *Stasi* dispatched over a dozen deputies to scrutinize her every move for six months. One *Stasi* agent was stationed near her to establish "an intimate personal relationship" with her. Her *Stasi* file, 1500 pages long, names confidants and coworkers from the foundry and from her church society as *Stasi* informants. Of the people she has encountered with this knowledge, only one has expressed regret. *Id.*

escape both in Berlin and along the remainder of the border.¹⁶ The violence was the result of a secret "shoot-to-kill" order formulated by various Communist officials and carried out by the border patrol.

Another area of concern for human rights groups involved the East German government's treatment of political prisoners. In the early 1980's, a fixed number of 4500 political captives remained in East German penitentiaries, "despite the quiet ransom" paid to obtain the release of those imprisoned.¹⁷ Like Czechoslovakia, the number of convictions in East Germany for "instigations hostile to the state" had increased as a consequence of anxiety over liberalization in Poland.¹⁸ Generally, prisoners freed from East German penal institutions characterized the conditions as tolerable, though their diets did not provide enough vitamins and protein.¹⁹ They stated, however, that "prisoners' compulsory work norms [ran] up to 300 percent higher than ordinary work norms."²⁰

Amnesty International also discovered a number of human rights violations in East Germany during the 1980's.²¹ Legal checks on common "freedoms of opinion, expression and emigration," harassment, and court imposed penalties for those who ignored the curbs existed even when the

16. *Trial of Former East German Border Guards Begins*, THE WEEK IN GERMANY, Sept. 6, 1991. Approximately 600 people were killed attempting to escape the former East Germany; the total number of those killed is almost twice the official number. This number included "30 West Germans, four citizens from the former Soviet Union, a Hungarian, an Italian and an Austrian who died while trying to cross the heavily fortified frontier." Erik Kirschbaum, *Germany: Nearly 600 Died Fleeing East Germany, Researchers Say*, Reuter News Service - Western Europe, Aug. 10, 1993, available in LEXIS, World Library, TXTNWS File. The number does not encompass "the 25 East German border guards killed, nor does it include East Germans who drowned in the Baltic Sea" or those who died in mishaps while attempting to flee. *Id.* Under the Penal Code of the GDR, an illegal frontier crossing was a criminal act, which the border guard, as a "member of the socialist society" had to stop, especially since an unlawful frontier crossing could be seen as "maligning the sovereignty of the GDR." Kif Augustine Adams, *What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 STAN. J. INT'L L. 271, 291 (1993).

17. Elizabeth Pond, *East Germany's Political Prisoners Raise West's Hackles*, THE CHRISTIAN SCIENCE MONITOR, June 19, 1981, at 11. The ransoms, arranged in clandestine gatherings between East and West German intermediaries, were the status quo according to officials in Bonn, West Germany. The payment for the prisoners included hard currency, gas and oil, food, and equipment. As of the late 1980's, the West German government had paid an estimated one billion dollars as a "humanitarian gesture." East Berlin officials felt the amount paid was "just compensation" for the money expended in educating the prisoners. Uli Schmetzer, *For 2 Germanys, Freedom Has Price*, CHI. TRIB., Apr. 6, 1987, at C1.

18. Pond, *supra* note 17, at 11. See *infra* note 45 and accompanying text.

19. Pond, *supra* note 17, at 11.

20. *Id.*

21. *Id.*

perpetrators did not use violence.²² The more grievous offenses included lingering use of the death penalty, insufficient food and medical care, and the inability of prisoners to register complaints.²³ After the Berlin Wall fell in 1989 and the two Germanys reunified in 1990, Germany was left with a legacy of more than forty years of communist oppression.

B. *Czechoslovakia*

A brief review of Communist Party rule in Czechoslovakia²⁴ shows the tight control the government exerted over its people. Upon liberation from the Germans in May 1945, the Czechoslovak regime came back from its exile in London; however, this government was soon pushed aside by the Communists' expropriation in 1948 which attempted to quash nationalistic feeling and the power of the Church.²⁵ The Communists ruled from 1948 until 1968 in a tight-fisted, Stalinist fashion.

During the first six months of 1968, Communist Party leader, Alexander Dubcek, in what would become known as the "Prague Spring of 1968," tried to reform the manner in which the Communists ruled Czechoslovakia. Dubcek wanted to implement the "Action Program," which originated with the Czechoslovak Communist Party and "spelled out in considerable detail the foundations for a new political, social and economic order."²⁶ Constitutional freedoms such as those of association and assembly, speech, and travel were among the rights outlined by the program,²⁷ and they went "far beyond anything previously attempted" in the Communist Bloc.²⁸ The proposed reform combined with the Anti-Soviet response to it²⁹ was enough to send Soviet tanks rolling into Prague, Czechoslovakia, on August 21, 1968.

In 1969, the Soviets removed Dubcek from his role of leader in the Czechoslovak Communist Party³⁰ and replaced him with Socialist hardliner

22. *Id.*

23. *Id.*

24. Czechoslovakia was founded in 1918 when the Treaty of Versailles excised the territory of the Czechs and Slovaks out of the Austro-Hungarian Empire. Lloyd Cutler and Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unom?*, 58 U. CHI. L. REV. 511 (1991).

25. *Id.* at 518. "The Church" is defined as the Roman Catholic Church.

26. PAUL ELLO, PH.D., *CZECHOSLOVAKIA'S BLUEPRINT FOR "FREEDOM"* 81 (1968).

27. *Id.* at 120, 122.

28. *Id.* at 16.

29. *Id.*

30. Michael Wise, *Dubcek Elected Chairman of Czechoslovak Parliament*, The Reuter Library Report, Dec. 28, 1989, available in LEXIS, World Library, TXTEE File. After leaving this position, Dubcek was selected to chair the Federal Assembly for less than a year before going to Turkey as Czechoslovakia's ambassador. He was ousted from the Communist

Gustav Husak. Under Husak, the proposed reforms died.³¹ Abroad, Husak's government was well-known for its persecution of Charter 77 human rights activists,³² its stringent regulation of the arts and audio and print media, and its "tight rein on Czechoslovakia's strong Roman Catholic Church."³³

The first response of Husak's regime to the declaration of Charter 77 was harsh and swift.³⁴ the regime brutally harrassed Charter 77 members and their associates. In the late 1970's, one well-known supporter of Charter 77, former high party official Zdenek Mlynar, was allowed to travel abroad for a prolonged period. He was stripped of his citizenship when the Czechoslovak officials conjured up a "diabolical bureaucratic Catch-22" situation.³⁵ After granting his request to travel, the government revoked Mlynar's authorization to travel and repealed his citizenship for being out of the country without their authorization.³⁶ Another example of the Husak regime's cruelty occurred at the funeral of founding Charter member Jan Patocka in 1977. The government officials tormented Patocka's mourners with video cameras, helicopters flying close to the ground, and the noise of motorcycles, gathered for a "rally" at the police academy track next to where Patocka was being buried.³⁷

In 1979, Charter 77 members prepared documents to be forwarded to the representatives of the thirty-five signatories of the Helsinki Accords who were meeting in Madrid, Spain, to monitor the progress of the historic

Party in June 1970 and demoted to a forestry job in his native Bratislava, Slovakia, where he lived relatively unknown as a pensioner until 1987 when he began protesting the rule of his unyielding successors. *Id.*

31. *Husak Exits as Reforms Re-emerge*, CHI. TRIB., Dec. 18, 1987, at C9. In the early 1970's, Husak's government expelled close to half a million party members affiliated with Dubcek's goals of democratizing fixed party arrangements and relaxing control on the nationalized economy. *Id.*

32. Charter 77, a Prague creation and a remonstrance of the intelligentsia, was formed to enforce the promises of human rights embraced in the Helsinki human rights accord signed in 1975 by 35 nations, including Czechoslovakia. Charles Sawyer, *The Forgotten Prisoners of Prague*, THE CHRISTIAN SCIENCE MONITOR, Nov. 6, 1980, at B18. The constitution announced that:

Charter 77 is a free and informal and open association of persons of convictions, religions and professions, linked by the desire to work individually and collectively for respect for human and civil rights in Czechoslovakia and the world — the rights provided for in the enacted international pacts, in the Final Act of the Helsinki Conference, and in numerous other international documents.

Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 584 (1990).

33. *Husak Exits as Reforms Re-emerge*, *supra* note 31, at C9.

34. Sawyer, *supra* note 32, at B18.

35. *Id.*

36. *Id.*

37. *Id.*

accords.³⁸ The Chartists, as the advocates of Charter 77 were popularly known, intended for the documents to demonstrate that the Husak government did not follow the human rights provisions of the Helsinki Accords.³⁹ The government's counteraction was fast and clear.⁴⁰ Prague police removed eleven of the best-known Chartists after only two meetings of the acting group.⁴¹

Members of cultural groups, such as the Jazz Section,⁴² found themselves hauled into court for engaging in various "illegal commercial activities." In 1984, the Husak government disbanded the Jazz Section.⁴³ Three years later the Jazz Section was charged with becoming "predominantly an economic body devoted to 'production, distribution and sales of publications.'"⁴⁴ After Poland's Karol Cardinal Wojtyla became Pope John Paul II in 1978, pressures on religious activity started to increase in Czechoslovakia to a degree similar to that of the Stalin era.⁴⁵ Neither Catholics nor other denominations were authorized to supply bishops for long-vacated offices despite the availability of priests to fill these positions.⁴⁶ Accordingly, the number of priests ordained decreased.⁴⁷ During the latter part of March 1988, police and riot officers armed with truncheons, night sticks, and water cannons assaulted a nonviolent crowd of 2000 to 3000 Catholics who were singing religious songs and holding candles.⁴⁸ The Catholic demonstrators sought a guarantee of basic liberties for members of

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* Two prior cabinet ministers, two former members of the party presidium, and two former members of the Central Committee of the Communist Party in Czechoslovakia were among those confined. Also imprisoned were two expelled university professors, a Charter 77 representative, and Rudolph Slansky, son of the Communist Party leader ousted in 1952 and lynched after a trial before a kangaroo court. *Id.*

42. Members of the Musicians Union created the Jazz Section in 1971 to promote jazz music. *Czech Jazz Rebels Face the Music in Court*, CHI. TRIB., Mar. 11, 1987, at C9.

43. *Id.* The director of the group, Karel Srp, questioned the government's decision to close the Musician's Union, stating that no reason had been given. According to Srp, 130 letters sent by the Jazz Section to official groups asking for the legal reinstatement of the group went unacknowledged. Srp stated that he "could not believe that . . . there could be someone who wanted to ban jazz music." *Id.*

44. *Id.*

45. Eric Bourne, *Czechoslovakia is Determined to Keep Churches in Line*, THE CHRISTIAN SCIENCE MONITOR, June 2, 1981, at 5.

46. *Id.* If replacements for the bishops were not found, the parish was erased from the record; this occurred frequently. *Id.* By 1988, the year before the end of Communist rule, there were only three bishops still alive, and all were older than 75 years old. Paula Butturini, *Czechoslovakian Primate Hits Police Violence at Protest*, CHI. TRIB., Mar. 27, 1988, at C3.

47. Bourne, *supra* note 45, at 5.

48. Butturini, *supra* note 46, at C3.

the Roman Catholic Church.⁴⁹ Roman Catholics had also demonstrated on March 6, 1988, near Bishop Tomsak's home demanding religious freedom and more bishops.⁵⁰ These calls, along with other requests for individual rights, went unheeded by the Husak regime.⁵¹

II. COMING TO TERMS WITH THE PAST

When the prior regimes in East Germany and the Czech Republic were toppled in 1989, the democratic governments which replaced them were left to deal with the damaged psyches of East German and Czechoslovak citizens. At the outset, these governments were faced with two means of reckoning with the past. They could either grant amnesties or pardons to those involved in the prior regimes, or they could attempt to prosecute them. Each alternative was fraught with difficulties which will be examined more closely in this section.

A. *Amnesty*

The term "amnesty" originates "from the ancient Greek word *amnestia*, which means forgetfulness or oblivion."⁵² "Perhaps implicit is the fear that battle-scarred politicians are more prone to vengeance than forgiveness . . . [and a] dose of amnesia is seen as the necessary tonic to coax them into reconciliation."⁵³ Amnesty, then, "wipes out all legal recollection" for many categories of transgressions.⁵⁴

This course of action would have been particularly attractive to the Germans and, in many respects, to the Czechs in light of their recent histories. "[W]here vengeance has fed endlessly on its own destructive effects, the political allure of amnesty's sweeping promise — to bury the hostilities of the past and to move on to better times — has captured the imagination and hope of the most determined peacemakers."⁵⁵

49. *Id.* Dissident Catholic activist Vaclav Benda, who later became the director of the Institute for the Documentation and Investigation of Communist Crimes, said that the police action supplied tangible data that the Communist authority had "no intention of following the example of more freedom of speech and perestroika, or restructuring, set by its Soviet Allies." *Id.*

50. *Id.*

51. Gustav Husak was replaced as Chief of Czechoslovakia's Communist Party by Milos Jakes in December 1987. *Husak Exits as Reforms Re-Emerge*, *supra* note 31.

52. John J. Moore, Jr., *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador*, 43 STAN. L. REV. 733, 734 (1991).

53. *Id.*

54. *Id.*

55. *Id.* The East Germans have lived under some form of totalitarianism since 1933 when Adolf Hitler came to power. In 1945, the Communists took over after Hitler's defeat.

While amnesty's advice to "forget" is conceived to assist leaders in mastering their desire for retaliation, it also embraces hazardous side effects handicapping their ability to report on injustice.⁵⁶ The truth of that investigating and reporting is based in the past which amnesty would like the successor governments to disregard.⁵⁷ The combined memory of a people is never overlooked, especially when it is bitter.⁵⁸ As philosopher George Santayana noted, "Those who cannot remember the past are condemned to repeat it."⁵⁹ The consequences of not heeding this admonition have proven to be disastrous.

B. Pardon

Some analysts have recommended that the comparable practice of pardon, which "remit[s] punishment for a crime" but does not ignore or repudiate a person's guilt,⁶⁰ is less offensive than an amnesty which delegates prior crimes to nothingness.⁶¹ This claim has a certain innate appeal.⁶² In Germany, Czechoslovakia, and the Czech Republic, the crimes perpetrated by the former regimes would be brought to light, and the guilt would be exposed and laid to rest on those who instigated the crimes. There would, however, be no incarceration.

It is argued, though, that the ability to pardon can decrease a government's capability to shield its citizens from harm.⁶³ Italian criminologist Cesare Beccaria succinctly stated, "To shew [sic] mankind, that crimes are sometimes pardoned, and that punishment is not the

Both Hitler and the Communists were ruthless in their punishments of those who were members or affiliates of the prior regimes. Before 1918, the Czechs and Slovaks had been ruled for approximately 200 years by the Hapsburgs as part of the Austro-Hungarian Empire. They enjoyed a brief 20-year period of self rule before Adolf Hitler invaded in 1938. After World War II, the Communists ruled until the "Velvet Revolution" in 1989. The first democratically elected president of Czechoslovakia, Vaclav Havel, a former dissident who had been imprisoned by the Communists, promoted amnesty as a solution. He stated, "The ones who really worked against the Communists don't have the same need to settle accounts as those who were silent. The silent ones are now taking revenge for their own humiliation." Mary Battiata, *E. Europe Hunts For Ex-Reds; Police List Used as Tool in Purge*, WASH. POST, Dec. 28, 1991, at A1.

56. Moore, *supra* note 52, at 734.

57. *Id.*

58. *Id.*

59. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 703 (Emily Morrison Beck et al. eds., 15th ed. 1980).

60. Moore, *supra* note 52, at 734.

61. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2604 (1991).

62. *Id.*

63. *Id.* at 2606.

necessary consequence, is to nourish the flattering hope of impunity."⁶⁴ There is a genuine concern that future government officials will feel that their lawlessness will go unpunished; the investigation into the past serves only to show that the crimes were committed, not to prevent similar activities in the future.

C. *Noncorporeal Punishment*

Perhaps a way to lessen this troublesome aspect of granting a pardon would be to levy some form of punishment other than incarceration. Although incarceration is what comes to mind when one thinks of punishment, it need not take this form.⁶⁵ Investigation and disclosure of the persons involved can serve as punishment.⁶⁶ Other examples include demotions, loss of government jobs, deprivation of pension rights, and monetary penalties.⁶⁷ The fines could be used to compensate victims or their families.⁶⁸ Allowing for punishment to take the form of something other than incarceration would bring justice to the victims. Those who are guilty would be revealed and castigated while the difficulties of a "victor's justice" would be avoided.⁶⁹

III. CHOICE OF LAW IN PROSECUTING

If instead of granting amnesty or a pardon, the current regime decides to prosecute the former Communists, a new set of difficulty arises. For example, the question of whose law to apply is a troublesome issue which will be addressed in this section.

A. *Legacy of Nuremburg*

The issue of which law to apply must be examined in light of the trials of Nazi war criminals after World War II, the infamous Nuremburg Trials. At first, twenty-two high-ranking Nazi officials were tried, a large

64. *Id.*

65. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 509 (1990).

66. *Id.*

67. *Id.*

68. *Id.*

69. "Victor's justice" is not justice corresponding to the rule of law, but a decision grounded on the victor's might to dictate an outcome to a defeated people. Adams, *supra* note 16, at 275-76. The rule of law, on the other hand, states the foundational principles for establishing a scheme of law. Under the rule of law, statutes must be "general and abstract, prospective, known and certain, and equally applicable to all individuals." *Id.* at 274.

number of whom were executed.⁷⁰ Although legally suspect, German legal intellectuals saw the trials as “politically and morally necessary.”⁷¹ The most disturbing element of the trials involved the ex-post facto use of foreign laws.⁷² Crimes against humanity, however, could be tried before an international court because the “conduct, by its nature, offended humanity itself.”⁷³ The offense’s legitimacy was beyond the scope of provincial or federal law as it was rooted in “humanity” under natural law.⁷⁴

Natural law, however, is not equipped with a set of transcribed laws,⁷⁵ and therein lies the difficulty in using natural law as a legal standard. The statutes are not ascertainable and certain.⁷⁶ It quickly became obvious to everyone that the Nuremberg tribunal was brought together by the conquerors who subjugated the conquered.⁷⁷ Although the acts of genocide and torture committed by the Nazis were atrocious, they were not crimes under the written German law at the time of the Third Reich. After the trials, ex-post facto laws were prohibited by Article 103 of the Basic Law of Germany.⁷⁸

B. *Prosecution under Domestic Law*

1. *East German Law*

Because the West Germans prohibited the application of an ex-post facto legal standard in their constitution, the German courts could then use East German law as the legal basis for its decisions.⁷⁹ This avoided the problem of the ex-post facto legal standard but begat others.⁸⁰ Theoretically, there were some enticing provisions of the East German Constitution which

70. William K. Pelosi, Colloquy, *Challenges to International Governance. Theme II - Communities in Transition: Autonomy, Self-Governance and Independence. Penalties for Prior Political Association*, in 87 AM. SOC'Y INT'L L. PROC. 174, 178 (1993) (remarks by Herman Schwartz).

71. *Id.*

72. *Id.*

73. Orentlicher, *supra* note 61, at 2556.

74. *Id.* One who perpetrated crimes against humanity was, “like the pirate, hostis humani generis, an enemy of all mankind, over whom any state could assert criminal jurisdiction.” *Id.* Natural law gleanes rules for moral behavior from the innate character of mankind. What that behavior is and how regulations are derived from it has been the topic of centuries-old debate. Adams, *supra* note 16, at 295.

75. *Id.*

76. *See generally id.* at 274.

77. Pelosi, *supra* note 70, at 178 (remarks by Herman Schwartz).

78. *Id.* Specifically, that article states that an act is subject to punishment only if it was a crime before the deed was perpetrated. *Id.*

79. *Id.*

80. *Id.*

allowed the German jurists to handle this subject.⁸¹ Article 19 of the East German Constitution provided: "All state agencies, all social efforts, and each individual citizen is required to observe and protect the integrity and the freedom of the person."⁸² East Germany actually had a number of personal protections against the invasion of postal privacy, telecommunications, and so forth, which had been applied when it suited the government's purposes.⁸³ These articles in the East German Constitution gave the German courts "a safe harbor where they [could] look to a superior law . . . and apply it at the statutory level to thousands of party functionaries."⁸⁴

2. Czechoslovak Law

Like East Germany, Czechoslovakia had provisions in its constitution to protect certain individual freedoms, but these provisions had been invoked only when it was convenient for the government. The Constitution of the Czechoslovak Socialist Republic guaranteed "freedom of expression in all fields of public life, including in particular freedom of speech and of the press."⁸⁵ Section 1 continued that "[f]or the same purpose, the freedom of assembly and freedom of street marches and demonstrations are guaranteed."⁸⁶

Article 29 suggested that "[c]itizens and organizations have the right to submit proposals, suggestions, and complaints" to governmental bodies, and that it is the duty of these bodies to take responsible and prompt action.⁸⁷ Similar to the East German Constitution, the Czechoslovak Constitution guaranteed the "inviolability of the home, the secrecy of letters, and the secrecy of other means of communication."⁸⁸ Although the communism practiced in Czechoslovakia did not espouse any form of organized religion, freedom to practice religion was guaranteed.⁸⁹ Thus, conceptually,

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. UST.ZAK.CSFR [Constitution] art. 28, § 1 (1960) (Czechoslovakia) *translated in* THE CONSTITUTIONS OF THE COMMUNIST WORLD 148-49 (William B. Simons ed., 1980).

86. *Id.* at 149. Article 28, Section 2 stated that the freedoms enumerated in Section 1 would be secured "by making available publishing houses and printing enterprises, public buildings, halls, free space, as well as broadcasting, television, and other facilities available to working people and their organizations." *Id.*

87. *Id.*

88. *Id.* art. 31.

89. Article 32, Section 1 of the Czechoslovak Constitution stated: "Freedom of confession is guaranteed. Everyone may profess any religious faith or be without religious conviction, and may perform religious acts insofar as this does not contravene the law." *Id.* In Section 2 of Article 32 the practice of religion is limited insofar as "[r]eligious faith or conviction cannot constitute a ground for anyone to refuse to perform civil duties imposed on

Czechoslovakia and the Czech Republic could turn to the prior constitution to prosecute those who violated rights such as freedom of speech, assembly, and religion.

C. *Prosecution under International Law*

1. *East Germany*

A basis for prosecution under international law could also be found in the former East German Constitution which stated that “[t]he generally recognized rules of international law which serve to promote peace and peaceful cooperation among peoples are binding on the state and its citizens.”⁹⁰ There was also some inviting language in United Nations (“U.N.”) agreements which as a participating U.N. member, East Germany agreed to adopt and enforce.⁹¹

One of the commitments which East Germany agreed to follow as a member of the United Nations is the Universal Declaration of Human Rights, the most recognized pronouncement of what constitutes human rights.⁹² Article 8 of the Declaration states: “Everyone has the right to an effective remedy⁹³ by the competent national tribunals for acts violating the fundamental rights⁹⁴ granted him by the constitution or by law.”⁹⁵ Because the East German government agreed to abide by international law via a constitutional mandate, the practical application of Article 8 would mean that an East German citizen would have the right to a remedy, presumably a trial before a court of law,⁹⁶ for an Article 19⁹⁷ violation of the East German Constitution.

him by law.” *Id.*

90. VERF [Constitution] art. 8, § 1 (1968) (German Democratic Republic) *translated in* CONSTITUTIONS OF THE COMMUNIST WORLD 167 (William B. Simmons ed., 1980).

91. The multilateral human rights agreements that countries have signed since the founding of the United Nations in 1945 clarify “the substantive rights of individuals vis-a-vis their own states.” Roht-Arriaza, *supra* note 65, at 474.

92. *Id.* at 475.

93. A study of the International Covenant on Civil and Political Rights discloses that the Commission on Human Rights had safeguarding the accountability of government officials for various infractions as its primary concern; this included disallowing officials the defense of sovereign immunity. *Id.* at 476. Sovereign immunity would have denied those who suffered abuses under a particular regime any remedy let alone an effective remedy.

94. Fundamental rights presumably include “the right to life and freedom from torture and arbitrary detention.” *Id.* at 475.

95. *Id.*

96. The Declaration suggests that the relief must be “individualized and adjudicatory.” *Id.* Thus, simply reimbursing victims or their families without any ability to bring a civil action in cases of torture or disappearance might not satisfy Article 8. *Id.*

97. *See supra* text accompanying footnote 82.

2. *Czechoslovakia*

Like East Germany, Czechoslovakia was a member of the U.N. and had signed various international human rights agreements which supposedly signified its commitment to fundamental individual rights. Foremost among these agreements was the Helsinki Accords of 1975. One of the document's guiding principles states, "The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion."⁹⁸ In Czechoslovakia the human rights group Charter 77 was formed to keep abreast with the government's progress in this area⁹⁹ and to send in periodic reports. Prosecutions of violations would seem feasible under this treaty because of the meticulous documenting of such treaty violations by Charter 77.

IV. POLITICAL TRIALS

A. *East Germany*

It does not appear that East Germany or the Czech Republic/Czechoslovakia has relied extensively on international law to prosecute, and each is relying heavily on domestic law.¹⁰⁰ Both positive law and natural law reasoning appear in the decisions. The difficulty in applying the law and not having the sentences carried out is evident in the context of some of the more famous political trials in East Germany and Czechoslovakia/Czech Republic.

1. *Border Guard Trials*

Some of the first individuals to be tried in the reunified Germany were the East German border guards. In the first trial, four border guards were charged with manslaughter under East German law in the death of twenty-year-old waiter, Chris Gueffroy, who attempted to flee East Germany by climbing over the Berlin Wall.¹⁰¹ Judge Theodor Seidel, Chief Judge of

98. Cutler, *supra* note 32, at 583.

99. *See id.* at 584.

100. International law is created when countries enter into agreements with one another and repeat certain practices. Whether international law exists with respect to a matter depends on whether "a state follows a custom because it thinks it is obliged to do so." This obligation, enforced individually by the parties to the agreement, provides international law with its power. Adams, *supra* note 16, at 281.

101. *Germany: First Suspects Charged for Berlin Wall Shootings*, Reuter News Service, June 15, 1991, available in LEXIS, World Library, TXTNWS File. Gueffroy was

the Berlin Regional Court, acquitted two defendants.¹⁰² He found another guilty of attempted manslaughter but only gave him a two-year suspended sentence.¹⁰³ The guard who fired the shots that killed Gueffroy was convicted of manslaughter and sentenced to three-and-a-half years in prison.¹⁰⁴

In handing down these sentences, Judge Seidel found that shooting to kill was authorized under East German law.¹⁰⁵ In spite of this, he concluded that a "higher moral law" had been infringed upon, thus invoking a natural law rationale.¹⁰⁶ He also stated that although the defendants were "at the end of a long chain of responsibility," they had transgressed "a basic human right" by firing at someone whose only crime was attempting to leave the country.¹⁰⁷ The guard "did not just fire bad shots randomly[; it] was an aimed shot tantamount to an execution."¹⁰⁸ In the second border guard trial, the German court found two border guards guilty of manslaughter in the December 1, 1984, death of Michael-Horst Schmidt.¹⁰⁹ The judge sentenced one guard to twenty-one months in jail and the other to eighteen months, but these sentences were also suspended.¹¹⁰

In contrast to Judge Seidel, Judge Ingeborg Tepperwein found that East German law did not mandate that the border guards shoot unarmed escapees with the intention of killing them.¹¹¹ The guards did not have to shoot Schmidt because he did not endanger the integrity of the border; therefore, the guards failed to meet the rule for use of lethal force under the law.¹¹² Judge Tepperwein suspended the sentences because of "the defendants' remorse and the system in which they grew up," where mechanical, robotic conformity was rewarded and individual morals were looked down upon, if not punished.¹¹³

accompanied by Christian Gaudin who was wounded but recovered. *Id.*

102. Adams, *supra* note 16, at 296.

103. *Id.*

104. *Id.*

105. *Id.* at 297.

106. See Adams, *supra* note 16, at 297.

107. *Id.*

108. *Id.* Ex-post facto laws were made unconstitutional by Germany after the Nuremberg Trials. Such laws deny a defendant due process because he has no notice of the existence of a law against a particular action. See generally part IV(A). The same can also be said when a natural law rationale is invoked. Judge Seidel, however, appears to have had no trouble in applying it to the case at bar. Seidel also "did not address the prosecution's principal assertion that the secret shoot-to-kill order was in violation" of international agreements or whether the border guards had an obligation to follow such laws. Adams, *supra* note 16, at 297.

109. *Id.*

110. *Id.*

111. *Id.* at 297-98.

112. *Id.* at 298.

113. *Id.*

The remaining border guard trials have resulted in several manslaughter convictions but very few murder convictions. Many sentences have been suspended, due to the mitigating circumstances of the border guards' upbringing as enumerated by Judge Tepperwein. The Germans soon grew impatient with the trials of those who carried out the orders and began demanding that those who gave the orders also be held accountable.

2. *Trial of Six*

Following many of the border guard trials and billed as the most spectacular trial in Germany since the Nuremburg trials of the 1940's,¹¹⁴ a reunified Germany brought charges against six former high-ranking East German officials accused of causing the deaths of East Germans who tried to flee to the West.¹¹⁵ From the outset, the trial's progress was plagued by a combination of political and legal problems, as well as the poor health of some of the defendants.¹¹⁶ Many East Germans, although critical of their Marxist-Leninist leaders, felt it hypocritical to put Honecker on trial when just a few years ago, he was given red-carpet treatment on his trip to Bonn, West Germany.¹¹⁷

Soon after being expelled from the East German Communist Party in 1989, Erich Honecker fled to the Soviet Union with his wife, Margot. However, pressure increased to bring Honecker back to answer for his "role in the shoot-to-kill policy along the Berlin Wall."¹¹⁸ The Soviet authorities did not feel compelled to extradite Honecker even though they wanted to forge a cordial relationship with the reunited Germany.¹¹⁹ After Boris Yeltsin promised to send him back to Germany in December 1991, Honecker found asylum in the Chilean embassy in Moscow.¹²⁰ In August 1992, Honecker was returned to Germany.¹²¹

Back in Germany, Honecker and his five cohorts were charged with issuing the secret shoot-to-kill order to East German border guards that

114. Adam LeBor, *Germany: Judge Delays Honecker Trial for Health Report*, THE TIMES (London), Nov. 13, 1992.

115. The six officials charged were Erich Honecker, successor to Communist Party leader Walter Ulbricht, who ruled until 1989; Erich Mielke, *Stasi* security police chief; Willi Stoph, prime minister; Heinz Kessler, defense minister; Fritz Streletz, Kessler's deputy; and Hans Albrecht, a local East Berlin Communist Party boss.

116. The combined ages of the six defendants was 452 at the beginning of the trial.

117. LeBor, *supra* note 114.

118. *Germany: Obituary of Erich Honecker*, DAILY TELEGRAPH (London), May 30, 1994, available in LEXIS, World Library, TXTNWS File.

119. *Id.*

120. *Id.* Honecker said he had obtained cyanide and that he would commit suicide if forced to go back to Germany. This proved to be an idle threat. *Id.*

121. *Id.*

resulted in more than 200 deaths. The six were brought to trial in November 1992.¹²² Prior to the first day of trial, Willi Stoph was forced to drop out because of a heart attack.¹²³ Within a week of Stoph's heart attack, the court determined that Erich Mielke would need to be tried separately because he could only be present in court three hours a day.¹²⁴ In spite of releasing two of the defendants for reasons of apparent ill-health, Honecker's lawyers still accused the judges of forcing Honecker "into a race with death."¹²⁵

Honecker remained silent for months regarding his trial and the pending charges.¹²⁶ When he did choose to speak, he defended the 1961 decision to build the Berlin Wall but tried to deflect responsibility to the Warsaw Pact, of which East Germany was a member.¹²⁷ Honecker indirectly defended the border shootings by saying that "East German defectors had tried to leave the communist state without permission."¹²⁸ Playing the role of victim, he stated that the urgency with which the former East German rulers were brought to justice was akin to the cruelty of Hitler's Third Reich.¹²⁹

In January 1993, the German court announced that it was dropping all manslaughter and embezzlement charges against Honecker.¹³⁰ Bernd Seite, Prime Minister of the East German province of Mecklenburg-Vorpommern, stated that dropping the charges was a "slap in the face for all those who died at the Berlin Wall."¹³¹ Karin Gueffroy, mother of Chris Gueffroy, one of the last to be shot while trying to cross the Berlin Wall, stated that Honecker was the recipient of "the humanity that he formerly did not grant to others."¹³²

122. LeBor, *supra* note 114.

123. Alexander Ferguson, *Honecker Trial to Continue Minus One Defendant*, Reuter News Service-Western Europe, Nov. 15, 1992, available in LEXIS, World Library, TXTNWS File.

124. Alexander Ferguson, *Germany: Second Defendant Drops Out of Honecker Trial*, Reuter News Service-Western Europe, Nov. 16, 1992, available in LEXIS, World Library, TXTNWS File.

125. *Id.* At this point Honecker had been diagnosed with terminal liver cancer.

126. Alexander Ferguson, *Germany: Honecker Breaks Silence to Defend Berlin Wall*, Reuter News Service-Western Europe, Dec. 3, 1992, available in LEXIS, World Library, TXTNWS File.

127. *Id.*

128. *Id.*

129. *Id.* As a young Communist agitator during the 1930's, Honecker spent time in Moabit, the prison which adjoins the court; ironically, he found himself residing there during the course of these proceedings. *Id.*

130. Adrian Bridge, *Germany: Anger and Joy as Honecker Flies to Freedom*, INDEPENDENT, Jan. 14, 1993, at 10, available in LEXIS, World Library, TXTNWS File.

131. *Id.*

132. *Id.*

While most Germans, both from the East and the West, felt that Honecker had eluded deserved punishment, there was a "grudging acknowledgement" that because he was terminally ill with cancer, there was no option but to let him go.¹³³ The sentiment was aptly put by Klaus Bolling, a former head of the West German mission in East Berlin, when he said, "In the end, we have shown that human dignity was more important than the desire to obtain a guilty verdict."¹³⁴

After Honecker's subsequent flight to Chile, a cloud of controversy still surrounded the decision to release him. Initial tests conducted by doctors in Chile appeared to contradict reports that Honecker had only six months to live because of liver cancer.¹³⁵ Of course, this created more anger in those who did not want the trial stopped. There were calls by former political prisoners for investigations of the constitutional judges who exceeded their authority by interceding in the matter.¹³⁶ Another lawyer representing families of Berlin Wall victims wanted to bring charges against the doctors who examined Honecker.¹³⁷ The trial of the remaining three defendants continued; however, the meaning of the trial was lost after Honecker left.¹³⁸

Former defense minister Heinz Kessler weakly defended his actions by saying that traps and mines installed on the country's border with West Germany were demanded by Moscow; he further denied that the killings of defectors by border guards were the result of a formal "shoot-to-kill" policy.¹³⁹ The traps and mines "were in no way an expression of intent to

133. *Id.*

134. *Id.*

135. Philip Sherwell, *Germany: Honecker Judges Face Legal Action*, DAILY TELEGRAPH (London), Jan. 19, 1993, available in LEXIS, World Library, TXTNWS File. Honecker did not die until May 1994.

136. *Id.* Only the federal constitutional court would have had the power to intercede. *Id.*

137. *Id.*

138. *Id.* With the flight of Honecker and his wife, Margot, to Chile, some of the impetus for the investigation into Margot's alleged criminal past as Minister of Education also waned. She had been accused of taking children from dissident parents and placing them in Communist homes. *Staatlich verordneter Kinderraub [State-Ordered Kidnapping]*, SUEDEUTSCHE ZEITUNG, May 25, 1991, available in LEXIS, World Library, ZEITNG File. These charges were later dropped, allegedly for lack of evidence. *Zwangsadoptionen in der DDR Verfahren gegen Margot Honecker eingestellt [Charges in Connection with Forced Adoptions in East Germany Dropped against Margot Honecker]*, SUEDEUTSCHE ZEITUNG, Mar. 9, 1994, available in LEXIS, World Library, ZEITNG File. The charges more than likely were dropped because of the difficulty the German government had in trying to extradite Erich Honecker from the Chilean government. The German government simply did not feel it was worth the time and effort to pursue the matter when there were more "important" officials to prosecute.

139. *Germany: Ex-East German Army Chief Says Moscow to Blame for Deadly Border*, Reuter News Service-Western Europe, Oct. 22, 1991, available in LEXIS, World Library,

kill but rather to discourage potential border violators from approaching.”¹⁴⁰ The judges apparently did not find the testimony credible and convicted the officials of “inspiring” border guards to shoot people attempting to cross to the West.¹⁴¹ All three were permitted to serve their sentences at home on account of “their age and the fact that ‘they were prisoners of Germany’s postwar history and of their political convictions.’”¹⁴² All three appealed their sentences, but the Federal Supreme Court fortified the original decisions by connecting them more directly to the killings.¹⁴³ The judges’ panel said that East German border guards for years had violated human rights assimilated into the 1948 United Nations Charter by shooting at those attempting to escape.¹⁴⁴ The court also noted the apparent injustice which would result in convicting those who carried out the decision while not convicting those who gave the orders.¹⁴⁵

In 1993, the bifurcated trial of Erich Mielke, the former *Stasi* chief, also resulted in a conviction for murder, but not for those resulting from the “shoot-to-kill” order. In a strange twist of events, Mielke was sentenced to six years for the 1931 murders of two policemen.¹⁴⁶ The court refused to apply the statute of limitations because the case had been interrupted in 1947 when German files were seized by the Soviet army in East Berlin but were later found after the fall of the GDR’s regime in 1989.¹⁴⁷ Mielke was sent to prison because of the fear he would flee the country.¹⁴⁸ Although officials released him after two years on account of ill health, the court still left open the possibility that Mielke could go on trial again if his health improved.¹⁴⁹ However, this possibility seems unlikely considering Mielke’s advanced age.

TXTNWS File.

140. *Id.*

141. Roger Boyes, *Germany: Catcalls Drown out Berlin Wall Sentencing*, THE TIMES (London), Sept. 17, 1993, available in LEXIS, World Library, TXTNWS File. Kessler was sentenced to seven years and six months, Stretetz to five years and six months, and Albrecht to four years and six months. *Id.*

142. *Id.*

143. *Court Rejects Appeals by Ex Top East Germans over Border Deaths*, DEUTSCHE PRESSE-AGENTUR, July 26, 1994, available in LEXIS, World Library, ALLWLD File.

144. *Id.*

145. *Id.*

146. *Erich Mielke Sentenced to Six Years for 1931 Murders; Faces Other Charges*, THE WEEK IN GERMANY, Oct. 29, 1993.

147. *Id.* The court, in effect, elected to toll the statute of limitations.

148. *Id.*

149. *Germany: Mielke May Be Tried Again One Day*, Reuter News Service-Western Europe, Dec. 14, 1995, available in LEXIS, World Library, TXTNWS File.

B. Czechoslovakia

1. Trial of Miroslav Stepan

In Czechoslovakia, Miroslav Stepan, the former Prague Party leader, was the first high-ranking Communist Party leader to have legal charges levied against him.¹⁵⁰ The charges were brought in connection with the November 17, 1989, attack on student protestors on Narodni Trida in Prague¹⁵¹ and in connection with another student protest at Wenceslas Square in Prague in 1988. The court ordered journalists to leave after the charges were announced because classified papers were being discussed.¹⁵² Later, the court opened proceedings to the public after being accused of "perpetuating totalitarian practices."¹⁵³ After a nine-day trial, the court sentenced Stepan to four years in prison for abuse of power by ordering the use of water canons, tear gas, dogs, and truncheons against demonstrators in October 1988 and January 1989.¹⁵⁴

The authorities further investigated Stepan for inducement to similar criminal acts against student protestors in November 1989 and found that Stepan instructed police chiefs "to use all available means" to suppress the demonstration.¹⁵⁵ Under the Czech legal code amended on July 1, 1990, only inducement to criminal acts carrying a sentence of at least eight years was punishable, and the count on which Stepan would have been charged carried a maximum three-year penalty.¹⁵⁶ The court, therefore, stopped proceedings in connection with these charges.¹⁵⁷ On appeal, a court cut

150. *Prague Party Boss Charged*, THE DAILY TELEGRAPH (London), May 23, 1990, International Section, at 10, available in LEXIS, World Library, TXTNWS File.

151. *Id.* Stepan was charged with committing an abuse of power. *Commission Report on November Police Violence*, BBC SUMMARY OF WORLD BROADCASTS, Dec. 14, 1989, available in LEXIS, World Library, ALLWLD File. The students sponsored the protest to recognize the 20th anniversary of the death of Jan Palach, who immolated himself to object to the the Warsaw Pact assault of Czechoslovakia in 1968. *Czechoslovakia: First Trial of an Ex-Communist Leader Opens in Czechoslovakia*, Reuter News Service-CIS and Eastern Europe, June 25, 1990, available in LEXIS, World Library, TXTNWS File.

152. *Czechoslovakia: First Trial of an Ex-Communist Leader Opens in Czechoslovakia*, *supra* note 151.

153. *Czechoslovakia: Prague Court Opens Ex-Communist Leader's Trial to Public*, Reuter News Service-CIS and Eastern Europe, June 29, 1990, available in LEXIS, World Library, TXTNWS File.

154. *Czechoslovakia: Former Prague Communist Chief Sentenced to Four Years*, Reuter News Service, July 9, 1990, available in LEXIS, World Library, TXTNWS File.

155. *Proceedings Against Miroslav Stepan Over 17th November Events Halted*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 16, 1990, available in LEXIS, World Library, ALLWLD File.

156. *Id.*

157. *Id.*

law who could not be contacted.¹⁶⁶ The District Attorney, Karel Bruckler, then decided not to prosecute again because of irregularities in the manner in which the accused had been apprised of the charges against them.¹⁶⁷ According to the District Attorney, citizens could remain away from their residences for several days, and investigators would not be allowed to commence proceedings under the article.¹⁶⁸ The suspects had "to be abroad or in hiding," and Bruckler did not agree with the investigator's opinion that those charged had hidden or been out of the country.¹⁶⁹

3. *Lustration*

While Czechoslovakia and the Czech Republic have attempted to bring several communist leaders to trial, the most controversial way the government has "prosecuted" individuals is through lustration.¹⁷⁰ The term "to lustrate" means to investigate the past activities of persons who wish to hold some government office.¹⁷¹ Under this scheme, persons affiliated with the Communist regime were placed into three all-encompassing classifications.¹⁷² The first group consists of "former secret police agents and their collaborators or former members of the [C]ommunist [P]arty who held positions of authority from the district level up."¹⁷³ These individuals are guilty if their names appeared in the files of the Ministry of Internal Affairs and are not allowed to hold "certain high level administrative positions" for a five-year period.¹⁷⁴ The second category consists of those who have been called "conscious collaborators," and a third group, which

166. *Id.* Former general secretary of the Communist Party of Czechoslovakia, Milos Jakes, and former trade union boss, Karel Hoffman, were charged under this provision; both denied the charges of evading prosecution and of illegally arming the People's Militia. *Czech Republic: Former Communist Leaders Deny Evading Prosecution*, BBC Monitoring Service: Eastern Europe, Jan. 5, 1995, available in LEXIS, World Library, ALLWLD File.

167. *Charges Against Former Heads of Communist Party and Unions Dropped*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 23, 1995, available in LEXIS, World Library, ALLWLD File.

168. *Id.*

169. *Id.*

170. "The word lustration comes from the Latin *lustrare*, meaning 'to put light on, or illuminate.'" *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, *supra* note 3, at 244 (remarks by Vojtech Cepl). This law was passed by the Czech and Slovak National Assembly on October 4, 1991. Mark Gibney, *Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future*, 23 DENV. J. INT'L L. & POL'Y 87, 123 (1994).

171. *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, *supra* note 3, at 244 (remarks by Vojtech Cepl).

172. Gibney, *supra* note 170, at 123.

173. *Id.*

174. *Id.* at 123-24.

Stepan's sentence from four years to two-and-a-half years.¹⁵⁸ To date, he is the only former Czechoslovak Communist official to spend any time in prison.

2. *Abortive Attempts to Prosecute*

The government of the Czech Republic attempted to bring charges against Communist officials in connection with activities of the People's Militia.¹⁵⁹ The prosecution involved members of the former Communist Party of Czechoslovakia Central Committee who decided to arm the Militia in 1985.¹⁶⁰ The charges were brought because the Militia was armed and allegedly not subject to any law.¹⁶¹ The Centre for the Documentation of the Illegality of the Communist Regime admitted that even though no law specifically regulated the Militia, other laws did assume its existence, and the investigation ceased.¹⁶²

The state attorney's office reviewed the decision not to press charges and decided that the documents gathered in connection with the case had not been reviewed thoroughly.¹⁶³ Notice of accusation could not have been served on all the people whom the investigator wanted to prosecute before the statute of limitations precluded it.¹⁶⁴ Under the criminal law of the Czech Republic, the prosecution process can only begin after the suspect has personal knowledge of the accusation.¹⁶⁵ To evade the running of the statute of limitations, the investigator charged the individuals as fugitives from the

158. *Czechoslovakia: Former Communist Chief's Sentence Cut to Two and Half Years*, The Reuter Library Report, Oct. 22, 1990, available in LEXIS, World Library, TXTNWS File. After his release from prison, Stepan wrote a bestseller chronicling his two-year incarceration. He is currently head of the Czechoslovak Communist Party. Although based in the Czech Republic, the party harbors the hope that the Czech Republic will once again reunite with Slovakia.

159. *Militia's Prosecution Smacks of Political Revenge - Stepan*, CTK National News Wire, Dec. 29, 1994, available in LEXIS, World Library, TXTNWS File. The People's Militia was the para-military wing of of Czechoslovakia's Communist Party until the collapse of the communist government in late 1989. *Id.*

160. *Id.*

161. *Investigation of Communist Officials; Interior Minister: Investigators Still Linked to Past*, BBC SUMMARY OF WORLD BROADCASTS, Dec. 29, 1994, available in LEXIS, World Library, ALLWLD File.

162. *Id.*

163. *Will More Than Six People Be Prosecuted for Militia Activity?*, CTK National News Wire, Dec. 29, 1994, available in LEXIS, World Library, TXTNWS File.

164. *Id.*

165. *Two Leaders of Former Communist Regime Prosecuted*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 4, 1995, available in LEXIS, World Library, ALLWLD File.

no longer exists, included those who belonged to what was called Category C, "potential candidates for collaboration."¹⁷⁵

Every national may petition a district governmental office for the outcome of his lustration, and he will receive a notice stating whether he was listed as a collaborator.¹⁷⁶ People holding any of the positions requiring lustration must give up their jobs if they refuse to submit a copy of the lustration results.¹⁷⁷ People not agreeing with the results of their lustration may appeal the decision to a court.¹⁷⁸

In February 1992, the Independent Appeals Commission was established, and as one of its major objectives, the Commission was to hear appeals by those who alleged they were wrongly charged with "conscious collaboration."¹⁷⁹ Most of the cases before the Commission consisted of Category C cases.¹⁸⁰ The Commission discovered that in many of these instances, people had been "talked to" by communist officials but had declined to go along with them, yet they were named as "potential candidates for collaboration."¹⁸¹ In response, the chair of the Commission filed suit before the Constitutional Court "challenging the legality of the lustration law."¹⁸² The Court held Category C to be illegal but found the remaining sections of the lustration law constitutional.¹⁸³

Although the courts have ruled lustration legal, the law has been highly criticized.¹⁸⁴ Essentially, critics do not like the screening process or the safeguards against false accusations.¹⁸⁵ The Constitutional Court eliminated the largest category, the Category C collaborators, but observers continue to criticize the law in theory for engendering employment discrimination and espousing the notion of collective guilt.¹⁸⁶ News reports indicate that the majority of those who have appealed lustration decisions in court have cleared their names.¹⁸⁷

175. *Id.* at 124.

176. *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, *supra* note 3, at 245 (remarks by Vojtech Cepl).

177. *Id.*

178. *Id.*

179. Gibney, *supra* note 170, at 124.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See generally id.* at 124-25.

186. *Czech Republic Human Rights Practices, 1994*, U.S. DEPARTMENT OF STATE DISPATCH, § 1994 Human Rights Report, Mar. 1995, available in LEXIS, World Library, ALLWLD File.

187. *Id.* In September 1994, the Government, in perhaps the most celebrated lustration case, dropped lustration charges against former parliamentarian Jan Kavan.

V. COMPARISON OF SUCCESS IN PAST PROSECUTIONS AND PLANS FOR FUTURE TRIALS

Germany, Czechoslovakia, and the Czech Republic have not been as "successful" in prosecuting their former communist leaders as some would have hoped. Germany, though, has had the most success in bringing its former communist officials to trial. This is explained, at least partially, by East Germany's reunification with West Germany and its established legal system. In Germany, those involved in the legal process of bringing the charges and trying the cases had experience in those areas. These individuals knew how to work with the procedural part of German law even though the substantive law was East German. For example, the acquittals and light sentences in the German trials did not come about because someone missed a statute of limitations deadline or neglected some other procedural matter. Many were a result of "equitable" or "ethical," rather than "legal" considerations, such as old age and poor health, as examined in the trials of Honecker, Mielke, and the rest. In the case of the border guard trials, the judges took into account the environment in which East German children were raised and also, to a certain degree, that they simply carried out the orders.

Czechoslovakia, on the other hand, did not have another country's constitution or procedural laws to use. After Czechoslovakia created a parliament, the parliament then had to draw up a constitution and related laws. This new system of laws either had never been applied or had been applied infrequently. Most of the officials involved in the trials, such as the lawyers and judges, had either not been involved in trying cases or had been involved in the legal system under the prior communist regime. Thus, there were many inexperienced people working within a newly developed legal system.

This inexperience is illustrated quite well by the attempt to prosecute those associated with the arming of the People's Militia.¹⁸⁸ The prosecution had the case for five years and did not investigate the allegations. In the eleventh hour, prior to the running of the statute of limitations, the prosecutor decided to bring charges. When he realized that he could not give Milos Jakes and Karel Hoffman personal service as required by law, he charged Jakes and Hoffman with being fugitives from the law although simply being away from one's home did not create a legal basis for such a conclusion. The prosecutor simply wanted to charge the men and did so in a hasty and sloppy manner.

Czechoslovakia also failed to bring charges against former Czechoslovak Communist President, Gustav Husak, who reinstated

188. See *supra* text accompanying notes 159-69.

Communist Party orthodoxy for twenty years and quashed many of the reform programs instituted by his predecessor, Alexander Dubcek.¹⁸⁹ He passed away relatively unknown in his native Slovakia in 1991, two years after the "Velvet Revolution."¹⁹⁰ These two examples illustrate how the inexperience of those operating the legal system can result in people being improperly charged, as with Jakes and Hoffman, or not being charged or tried at all, which happened with Husak.

These courts, in spite of the difficulty, are still attempting to deal with their Communist pasts. On January 15, 1996, Egon Krenz, Erich Honecker's successor, and five others went on trial for the deaths of refugees trying to flee East Germany.¹⁹¹ This trial was to have started in November 1995 but was postponed twice.¹⁹²

During his trial Krenz has maintained that the blame for sustaining the border lies with the former Soviet Union although he did express regret for the many deaths which occurred at the East German frontier.¹⁹³ Krenz's "defense" of placing responsibility with the former Soviet Union was dealt a severe blow when the former Soviet Ambassador to East Berlin, Pyotr Abrasimov, could not testify on account of ill-health.¹⁹⁴ Abrasimov's testimony was expected to support Krenz's defense.¹⁹⁵ Another of the six defendants, Kurt Hager, the former Communist Party ideology chief, could not stand trial due to age and illness.¹⁹⁶ The trial continues, however,

189. *Czechoslovakia: Former Czechoslovak Leader Husak Headed Despised Old Order*, Reuter News Service-CIS and Western Europe, Nov. 18, 1991, available in LEXIS, World Library, TXTNWS File.

190. *Id.*

191. *Deutschland: Neuer Prozess in Berlin Gegen Sechs SED-Politbueromitglieder [New Proceedings in Berlin Against Six Members of the Politbureau]*, NEUE ZUERICHER ZEITUNG, Jan. 16, 1996, available in LEXIS, World Library, ZEITNG File.

192. The first trial was postponed because the judge, Hansgeorg Braeutigam, was found to be biased. He was the same judge who presided over Erich Honecker's trial and was reprimanded because he asked for Honecker's autograph. The trial then was postponed a second time on account of the ill health of another defendant, Guenther Kleiber, who needed a kidney operation. *Germany: Ex-East German Leaders' Manslaughter Trial Resumes*, Reuter News Service-Western Europe, Jan. 15, 1996, available in LEXIS, World Library, TXTNWS File.

193. *Germany: E. German Ex-Leader Says Innocent of Wall Deaths*, Reuter News Service-CIS and Eastern Europe, Feb. 19, 1996, available in LEXIS, World Library, TXTNWS File.

194. *Ex-Soviet Ambassador Shuns Berlin Wall Death Trial*, Reuters World Service, Mar. 28, 1996, available in LEXIS, World Library, TXTNWS File.

195. *Id.*

196. *Trial of East German Ideology Chief Suspended*, Reuters Limited, May 9, 1996, available in LEXIS, World Library, TXTNWS File.

because many view this trial as Germany's last chance to get lasting convictions of some of East Germany's top Communist officials.¹⁹⁷

In the Czech Republic, investigators from the Office for the Documentation and Investigation of the Crimes of Communism have planned to bring treason charges against 10 individuals in connection with the Soviet invasion of Czechoslovakia in 1968.¹⁹⁸ The Office has brought treason charges against seven of the accused for undermining the Czechoslovak government in 1968 and supporting the Soviet invasion.¹⁹⁹ A decision on whether the remaining accused will be charged should come in the latter part of 1996.²⁰⁰ None of the accused have gone to trial, but they have not been given presidential amnesties, either.²⁰¹ Like Germany, this will probably be one of the Czech Republic's last major prosecutorial efforts.

However, the question remains whether there has been any purpose served by the attempt to legally prosecute former Communist officials in Germany, Czechoslovakia, and the Czech Republic. With the exception of the Nuremberg trials, these prosecutions represent some of the first attempts by democracies during the twentieth century to prosecute officials who committed abuses under prior regimes. When a fledgling democracy undertakes such a project, there will inevitably be difficulties in deciding whether to apply domestic or international law. Problems also arise when judges are charged with interpreting the laws of another country, i.e. those of the prior regime, in whose legal system they have not been trained. It is very important that the trials are not conducted as "witch hunts," where the accused are summarily found guilty without any sort of due process right to answer their accusers. These trials do serve as an important model for other countries and international tribunals, which are attempting to prosecute abuses committed by prior governments. Legal considerations aside, the impetus for the trials must come from the people. Without public support the governments may not feel prosecuting is worth their efforts unless their only goal is to exact revenge. Criminal prosecutions are, after all, brought

197. Any decision rendered in this case and other similar cases could still be overturned by Germany's Constitutional Court for being an illegal application of ex-post facto laws. *Germany. No Law, No Justice*, THE ECONOMIST, Mar. 9, 1996, at 51.

198. *Charges For Treason, Illegal Arming Are Prepared - UDV*, CTK National News Wire, Jan. 22, 1996, available in LEXIS, World Library, TXTNWS File. Seven individuals have been accused of sabotage and three with undermining the republic. *Id.*

199. *Treason Case Returns to UDV*, CTK National News Wire, July 8, 1996, available in LEXIS, World Library, TXTNWS File. If their guilt can be proven, possible sentences range from 12 years to life imprisonment. *Id.*

200. *Treason Charges Against 3 Apparatchiks May Be Brought Soon*, CTK National News Wire, Aug. 9, 1996, available in LEXIS, World Library, TXTNWS File.

201. *Justice Minister Finds No Reasons For Pardoning Traitors*, CTK National News Wire, Apr. 25, 1996, available in LEXIS, World Library, TXTNWS File. The amnesty is intended to apply to those too infirm or old to stand trial. *Id.*

on behalf of "the people." Inflation and unemployment problems in both Germany and the Czech Republic have begun taking the forefront in people's minds, not punishing the abuses perpetrated in the not-so-distant past.

Perhaps the fact that many of those convicted received light or suspended sentences has also played a part in the waning support for further prosecutions. Some, such as former Czechoslovak President Gustav Husak, eluded prosecution altogether. In some instances these "light" sentences could not have been avoided. It would have been viewed as vengeful to prosecute those officials too old or sick to stand trial. This current lack of public support does not mean that the trials have been a failure. It simply means that people are ready to move forward with the business of everyday living.

VI. CONCLUSION

The trials in Germany, Czechoslovakia, and the Czech Republic have served an important purpose. In spite of the difficulties encountered, the trials brought the abuses perpetrated by these regimes into the open and, in some cases, punished those responsible. They illuminated the problems and mistakes which can occur when prosecuting officials from a prior regime. The mistakes made and lessons learned will assist those involved in the Bosnian War Crimes Trials and future tribunals in conducting prosecutions which are fair to both the accused and the accuser.

*Adrienne M. Quill**

* J.D. candidate, 1997, Indiana University School of Law - Indianapolis. B.B.A. in Accountancy, 1989, University of Notre Dame.

