**Convictions of Former Members of East Germany's National Defence Council and of Border Guard are Valid**

The Second Senate of the *BVerfG* held unanimously that the constitutional complaints of the three former members of East Germany's National Defence Council (NDC), Albrecht, Kessler, and Streletz, and that of a border guard against their criminal convictions in connection with the killing of East German refugees at the former border with West Germany, should be rejected. The judgements of the *Berlin Landgericht* (LG) and the *Bundesgerichthof* (BGH) could not be questioned on constitutional grounds, for they did not injure the applicants' fundamental rights or similar constitutional guarantees.

I. It was not contrary to the ban on retroactive effect contained in Art. 103 (2) GG that the criminal courts had refused to allow the applicants to rely on grounds for justification contained in East Germany's regulations, as interpreted and applied in practice.

1. Elaborating on Art.103 (2) GG, the Court declared that it fulfilled its function of guaranteeing fundamental rights and the rule of law through a strict formulation. The article permits a punishment only if, at the time the act was committed, such an act was forbidden and punishable by statute with sufficient certainty. The norm also prevents the imposition of a penalty higher than that foreseen by statute at the time of the act. The constitutional ban on retroactive effect thus gives the citizen confidence, that the State can only pursue him or her for behaviour which the legislator has defined by statute as unlawful, and set a particular penalty for, at the time of the act. For this reason, a grounds for justification regulated by statute when the act is committed should continue to be applied, even when it has ceased to exist by the time of the criminal procedure.

Nevertheless, Art. 103 (2) GG is aimed at the usual case, in which the act is committed and judged in the area of application of (West) Germany's criminal law, as shaped by the Constitution. This cannot be valid without limitation when it is provided by statute, as a result of Germany's reunification, that the criminal law of the former East Germany shall apply for crimes committed in the former East Germany. The grounds for confidence which the norm protects cease to exist when the other State excludes criminal liability for the most serious criminal injustices through grounds of justification in national regulations, which support and favour such injustice as to seriously flout human rights generally recognised by the international community. The strict protection of trust afforded by Art. 103 (2) GG must then be withdrawn. The applicants are therefore denied the chance to rely on these grounds of justification; instead they are guaranteed punishment according to the statute in force at the time of the act.

2. The judgements challenged complied with these principles of constitutional law, and in particular the *BVerfG* gave its support to the *BGH's* judgement. The *BGH* had declared that grounds for justification which covered the intentional killing of persons attempting no more than to cross the border unarmed, were ineffective as an obvious breach of internationally protected human rights. The breach was so serious that it went against the legal perceptions of human value and dignity held by all nations. In such a case, positive law had to give way to justice. The *BVerfG* supported this evaluation of the *BGH*.

The applicants' argument that the right to life and free movement were not unconditionally guaranteed by the International Covenant on Civil and Political Rights was also unsuccessful. It was true that western democratic States under the rule of law did permit the use of firearms, in particular for the pursuit and capture of criminals, and that East Germany's statutory regulations on the use of firearms at the border at that time did conform with those in force in West Germany. However, the *Berlin LG* and the *BGH* had established that the statutory situation was eclipsed by commands given. The use of firearms was in no way restricted by the principle of proportionality: border guards were ordered that anyone breaching the border should be "destroyed" if they could not be prevented with other means. Subordinating the right of life of individuals to the interests of the State was a most serious injustice.

II There are no other constitutional considerations which can count against the convictions.

1. The *BVerfG* did not consider there to be any infringement of constitutional law in evaluating evidence, establishing guilt, or determining the punishment.

2. The conviction of the border guard did not infringe the constitutional principle of "no penalty without guilt". The criminal courts excluded the excuse of "acting on orders", because it was clear from the circumstances for the border guard that the use of firearms at the border was unlawful. However, the courts had not discussed the effect on soldiers recognising the unlawfulness of the act, which resulted from the grounds of justification being given the authority of the state. In such a case, it is not necessarily the case that the average soldier will recognise the unlawfulnessof an act objectively considered as a serious breach of human rights; this must be considered in the light of the individual soldier's upbringing, indoctrination and other relevant circumstances. The courts nevertheless rightly considered that killing unarmed refugees through continuous fire in the established circumstances was such a terrible act denying any possible justification, that it was clear and obvious to even an indoctrinated person that this was disproportional and unlawful. The other considerations of the criminal courts also make clear that the principle of guilt is satisfied.

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