The German Border Guard Cases before the European Court of Human Rights

In the spring of 2001, the European Court of Human Rights (ECHR) in Strasbourg decided that the criminal conviction, by the courts of the Federal Republic of Germany, of high ranking functionaries of the German Democratic Republic (GDR) and its border guards, for intentional homicide offences on the border to the Federal Republic of Germany (FRG), does not constitute a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). The authors of the following contribution analyze the decisions of the Strasbourg Court and critically dissect its arguments.2

1. INTRODUCTION

On 22 March 2001, the ECHR judicially concluded the criminal proceedings for homicide on the GDR-FRG border.3 In the course of the nineties, in the so-called


2. Translated by Ann Marie Ackermann, JD. The authors’ joint research in the project ‘Strafrecht in Reaktion auf Systemunrecht – Criminal Law in Reaction to State Crime’ at the Max Planck Institute forms the basis of this article, which is a revised version of the authors’ article ‘Menschenrechtsschutz durch Art. 7 Abs. 1 EMRK’, published in the German law journal 55 Neue Justiz (2001) pp. 561–569. The authors wish to express their gratitude to the editors of the ‘Neue Justiz’ for permitting the publication of an English version.

'Border Guard Trials' (Mauerschützenprozesse) – those cases against members of the GDR border guards and against members of the National Defence Council (NDC) – as well as in the ‘Political Bureau litigation,’ courts of the Federal Republic of Germany had passed a series of sentences for intentional homicide, with (in part) multi-year terms of imprisonment.\(^4\) The former GDR defence minister Keßler and his deputy Streletz were, as members of the NDC, sentenced to seven years and six months and five years and six months imprisonment, respectively, and the border guard K.-H. W. to one year and ten months juvenile detention, suspended on probation.\(^5\) Krenz, as a member of both the Political Bureau and the NDC, was sentenced to six years and six months imprisonment.\(^6\) After the German remedies were exhausted, i.e. appeals to the Bundesgerichtshof, or Federal Court of Justice (BGH), and constitutional petitions to the Bundesverfassungsgericht, or Federal Constitutional Court (BVerfG), were in effect unsuccessful and merely led, in part, to a finding of guilt on other grounds,\(^7\) the convicted defendants availed themselves of the opportunity to file an individual application against the FRG on the basis of a violation of the Convention.\(^8\) 

The four applicants especially objected to an infringement of the prohibition against punishment through retroactive application of the law in Article 7 § 1 of the Convention. They maintained that their offences, i.e., the killing of individuals attempting to flee the GDR, were, at the time of their commission, neither criminal under GDR law nor under international law. The litigation ended in two judgments: in the case of Streletz, Keßler, Krenz v. BRD the Court unanimously held that Article 7 § 1 of the Convention was not violated; in the case of K.-H. W. v. BRD the decision was 14 – 3.

\(^4\) For the leading case, see Bundesgerichtshof (Federal Court of Justice), BGHSt 39, 1; NJW 1993, 141; 100 International Law Reports [ILR] 364 (English translation).


\(^7\) The Bundesgerichtshof, in its judgment on appeal of 26 July 1994, found criminal liability on the part of Streletz and Keßler, not on account of incitement to commit intentional homicide as the Landgericht Berlin did, but on the basis of intentional homicide as indirect principals; the sentence, however, remained unchanged.

\(^8\) European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950; ETS No. 5; 213 UNTS (1950) 221. For the cases and proceedings before the ECHR see H. Kreicker, op. cit. n. 3, pp. 3–7.